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Supreme Court of the United States

October Term, 1963

No. 16

BANCO NACIONAL DE CUBA,
Petitioner,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated, August 29, 1963.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement of the Case	3
Summary of Argument	7
POINT I—The Courts of the United States may not refuse to give legal effect to decrees of the sovereign government of the Republic of Cuba which nationalized property then within its own boundaries	11
POINT II—The Act of State doctrine is sound as a matter of policy; no exceptions to the rule are warranted	16
POINT III—The Act of State doctrine is not a rule of judicial abstention and even if it were, there has been no waiver of that rule in this case	24
POINT IV—Assuming that the Act of State doctrine is subject to exception when the Act of State violates international law, no such violation appears here	27
A. The record presents no question of international law	27
B. The findings of the courts below, that international law was violated by the Cuban decree, were in error	34
POINT V—The reliance by the Court of Appeals upon matter not in the record violated petitioner's rights to due process of law	51
POINT VI—In any event, petitioner had good title to the sugar in question and if C.A.V. had any remedy it was for damages in an international forum	53
CONCLUSION	60
APPENDIX	61

Authorities Cited

CASES:

	PAGE
Affaire Hardmuth, 79 Journal du Droit International 1200 (1952)	18
Allsop & Co. [1910], For. Rel. U. S. 146	31
American Banana Co. v. United Fruit Company, 213 U. S. 347	8, 12, 17
Anglo-Iranian Oil Co. v. Idemitsu Kaisan Kabushiki Kaisha [1953], Int'l L. Rep. 305	14
Anglo-Iranian Oil Co. v. Jaffrate, [1953] 1 weekly L. R. 246	54
Anglo-Iranian Oil Co. v. S.U.P.O.R. (Rome) [1955], Int'l L. Rep. 23	15, 45
The Antelope, 23 U. S. (10 Wheat.) 66	35
The Antioquia (1865), VI Moore, Digest Int'l L. 644 (1906)	30
In Re Aughenbaugh, 125 F. 2d 887 (C. C. A. 3, 1941)	52
Baasch & Roemer, Ralston, Venezuelan Arbitrations of 1903, 906	33
Baron de Neuflize v. Germany [1927-28], Ann. Dig. 323	32
Banco de España v. Federal Reserve Bank of N. Y., 114 F. 2d 438 (C. C. A. 2, 1940)	12
Banco Nacional v. Sabbatino, 193 F. Supp. 375, aff'd 307 F. 2d 845 (C. A. 2, 1962)	1, 13, 15, 19, 20, 24, 25, 27, 30, 33, 35, 36, 38, 40, 42, 43, 45, 51, 52, 53
Behn, Meyer & Co. Ltd. v. Miller, 266 U. S. 457	28
Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F. 2d 375 (C. A. 2, 1954)	6, 16, 25
Bernstein v. Van Heyghen Freres, 163 F. 2d 246 (C. C. A. 2, 1947)	12, 25
Blad v. Bamfield, 3 Swan. 604, 36 E. R. 992 (1674)	14
Boone v. Chiles, 35 U. S. (10 Peters) 177	52

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	PAGE
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Clark v. Uebersee Finanz-Korp., 332 U. S. 480	28
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De Keller v. Maison de la Pensee Francaise, 82 Journal du Droit International 119 (1955)	13
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Dougherty v. Equitable Life Assurance Society, 266 N. Y. 71 (1934)	12
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El Triunfo [1902], For. Rel. U. S. 859	30
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Guaranty Trust Co. of N. Y. v. United States, 304 U. S. 126	12
Hatch v. Baez, 7 Hun 596 (N. Y. Sup. Ct., 1876)	14, 17
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Henneford v. Northern Pac. Ry. Co., 303 U. S. 17	52
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Hewitt v. Speyer, 250 F. 367 (C. C. A. 2, 1918)	12
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Hudson v. Guestier, 8 U. S. (4 Cranch.) 293	14
Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88	52
Janson v. Dreifontein Consolidated Mines, Ltd. [1902], A. C. 484	29
Kunigl v. Donnersmark (1955), 1 Q. B. 515	29
Lang v. Commissioners, 2 Knapp's P. C. Rep. 51 (1823)	33
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Luther v. James Sagor & Company, L. R. [1921], 3 K. B. 532	13, 18
Mann v. Compania Petrolera Trans-Cuba, S.A., 32 Misc. 2d 790, 223 N. Y. S. 2d 900 (Sup. Ct., 1961)	12, 13
Menendez v. Aetna Ins. Co., 311 F. 2d 437 (C. A. 5, 1962), petition for certiorari pending, October Term 1963, No. 68	15
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	PAGE
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The Paquete Habana, 175 U. S. 677	35
Pasos v. Pan American Airways, Inc., 229 F. 2d 271 (C. A. 2, 1956)	12
The Pedro, 175 U. S. 354	28
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Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft [1937], A. C. 500	24
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Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E. D. Va., 1961), aff'd 295 F. 2d 24 (C. A. 4, 1961)	14, 19, 26, 56
Romano-Americana (1926), For. Rel. U. S. 308	31
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Thomson v. Gaskill, 315 U. S. 442	52
Tlahualilo [1913], For. Rel. U. S. 993	30
Underhill v. Hernandez, 168 U. S. 250	5, 12, 14, 27
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United States v. Diekelman, 92 U. S. 520	57
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United States v. Pink, 315 U. S. 203	12, 27
United States ex rel. von Heymann v. Watkins, 159 F. 2d 650 (C. C. A. 2, 1947)	12
Waters v. Collot, 2 U. S. (2 Dall.) 247	14

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Arbitration Agreement of 1931, 47 Stat. 1982; T. S. 844	21
Buenos Aires Protocol of Non-Intervention of December 3, 1936 (51 Stat. 41, T. S. 923; 188 L. N. T. S. 31)	43

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	PAGE
Charter of the Organization of American States (2 U. S. T. 2395; T. I. A. S. 2361; 119 U. N. T. S. 3)	43
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Treaty of Versailles, June 28, 1919 32
28 U. S. C. 1254(1), 1331, 1332 1
Yugoslavian Agreement of July 19, 1948, 62 Stat. 2658, T. I. A. S. 1803, 89 U. N. T. S. 43 ..... 59, 60

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Agrarian Reform Act of May 17, 1959 ..... 38, 40
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	PAGE
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Decree of August 6, 1960	7, 26, 40, 42, 44
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Duke University Law School, The Nationalization of British Industries (1951) 36
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PAGE

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Katzarov, Validity of the Act of Nationalization in International Law, 22 Modern L. Rev. 629 (1959) 37

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	PAGE
Macmahon and Dittmar, The Mexican Oil Industry Since Expropriation (1942)	36
Mann, Outlines of a History of Expropriation, 75 L. Q. Rev. 188 (1959)	37
Metzger, Act of State Doctrine and Foreign Relations, 23 U. Pitt. L. Rev. 881 (1962)	37
Meyer and Szulc, The Cuban Invasion (1962)	44
II Moore, Digest of Int'l L. 33 (1906)	56
Morgenstern, Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which Are Contrary to International Law, 4 Int'l L. Q. 326 (1951)	16
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Nishoff, Confiscations in Anglo-American Law (1956)	36
Nixon, Six Crises (1962)	44
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Phillips, Cuba: Island of Paradox (1960)	39
Re, Foreign Claims Settlement Commission: Its Functions and Jurisdiction, 60 Mich. L. Rev. 1079 (1962)	37
Re, Foreign Confiscations in Anglo-American Law (1951)	36
Reeves, Act of State Doctrine and the Rule of Law—A Reply, 54 Am. J. Int'l L. 141 (1960)	17

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MISCELLANEOUS TREATISES AND ARTICLES (cont'd):

	PAGE
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United States diplomatic correspondence, re: Mexican Nationalizations; (1938) 5 For. Rel. U. S. 698	22, 23
(1938) 5 For. Rel. U. S. 679-702	47, 48
(1938) 5 For. Rel. U. S. 674	54
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Van Tyne, Loyalists and the American Revolution (1929)	48
Villarejo, American Investment in Cuba, New University Thought (Spring, 1960)	40
Wadmond, Judicial Protection of Property Abroad, 16 Bus. Law 688 (1961)	37
G. White, Nationalization of Foreign Property (1961)	36
Williams, International Law and the Property of Aliens, Brit. Yb. Int'l L. 1 (1928)	37, 45
Williams, The United States, Castro and Cuba (1962)	39
Wortley, Expropriation in Public International Law (1959)	36
Wortley, Protection of Property Situated Abroad, 39 Tul. L. Rev. 739 (1961)	37
Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826 (1959)	16
Zeitlin and Scheer, Cuba: Tragedy in Our Hemisphere (1963)	39

Supreme Court of the United States

October Term, 1963

No. 16

BANCO NACIONAL DE CUBA,

Petitioner,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court is reported at 193 F. Supp. 375 (S. D. N. Y., 1961). The opinion of the Court of Appeals is reported at 307 F. 2d 845 (1962).

Jurisdiction

The judgment of the Court of Appeals was entered on July 6, 1962. The petition for certiorari was filed on September 4, 1962 and was granted on February 18, 1963. The jurisdiction of this Court is invoked under 28 U. S. C., Sections 1254(1), 1331 and 1332.

Statutes Involved

There are no statutes or regulations of the United States involved. There are, however, a pertinent statute and decree of the Government of Cuba. The texts of those enactments, so far as relevant, appear at R. 97-107 and are reprinted in the Appendix hereof.

Questions Presented

The fundamental question presented by this record is:

1. May the courts of the United States refuse to give legal effect to decrees of the sovereign government of the Republic of Cuba which nationalized certain property then within its own territory?

The following subsidiary questions are presented:

2. May a corporation organized under the laws of the Republic of Cuba claim rights against that government under international law because most of its stockholders are residents of the United States?

3. Were the Cuban nationalization decrees discriminatory against nationals of the United States; and were they intended solely as a retaliation against the homeland of said nationals?

4. Did the said nationalization decrees violate accepted norms of international law?

5. Did the Court of Appeals violate due process in making a decision adversely affecting petitioner's property rights on the basis of excerpts from private correspondence, not in the record, between an *amicus curiae* and the State Department?

6. Assuming an answer adverse to petitioner on all of the foregoing questions, does the former owner of the nationalized property retain any interest in that property, or is his remedy solely for damages and, if so, in what forum?

Statement of the Case

This is an action by Banco Nacional de Cuba against Farr, Whitlock & Co. (hereinafter "Farr"), a partnership located in New York City. Peter L. F. Sabbatino was originally sued herein as Receiver of the assets of Compania Azucarera Vertientes-Camaguey de Cuba, appointed pursuant to Section 977b of the Civil Practice Act of New York. Petitioner sought to enjoin him from acting as such Receiver. After the Court of Appeals decision herein, the receivership was terminated by a decision of the Supreme Court of the State of New York, in a proceeding having no connection with this case, and to which petitioner was not a party. *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 39 Misc. 2d 63, 240 N. Y. S. 2d 247 (1962). Hence, the allegations of the complaint insofar as they relate to the Receiver are moot.

The facts out of which this action arose are as follows:

Early in 1960, Farr entered into contracts to purchase sugar from General Sugar Estates, Inc., a Cuban corporation, which is a wholly owned subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba, (hereinafter "C.A.V."), another Cuban corporation which was engaged in the manufacture of sugar (R. 6, 73, 83). Most of the capital stock of C.A.V. is owned by residents of the United States (R. 44). Payment for the sugar was to be made by Farr by presentation in New York of the necessary shipping documents accompanied by a sight draft (R. 6, 83).

On August 6, 1960, the sugar which was the subject of the contract was being loaded aboard a vessel in Cuba (R. 73). On that date, the government of Cuba nationalized the real and personal property in Cuba of C.A.V., pursuant to Law No. 851 of July 6, 1960 and Resolution No. 1 of August 6, 1960 (R. 101, 105; App. pp. 61-71, *infra*). Five days later, the loading having been completed, Farr entered into contracts with Banco Para el Comercio Ex-

terior de Cuba (a public corporation wholly owned by the Government of Cuba), identical in terms with the original agreements between Farr and C.A.V. The vessel departed from Cuba on the same day, bound for Morocco (R. 75, 81).

The bills of lading were assigned to petitioner (also a Cuban public corporation) and, together with a sight draft in the sum of $175,250.69, were sent by petitioner to Societe Generale, petitioner's agent in New York, with instructions to deliver the draft and shipping documents to Farr, upon payment of the draft (R. 25). On Friday, August 26, 1960, the officers of C.A.V. in New York, advised Farr of Sabbatino's appointment as Receiver of C.A.V. and that C.A.V. claimed to be the owner of the sugar (R. 18, 20).

Later on the same day, August 26th, a written agreement was entered into between Farr and C.A.V. By its terms, Farr agreed that if it received the sum of $175,000, it would not turn it over to petitioner or to Societe Generale, but would withhold it until compelled by court order to pay over said sum to the Receiver. C.A.V. on its part agreed: (a) that it would indemnify Farr against any claim with respect to said sugar (except a claim by the Receiver) for a period of six years; (b) that it would defend, at its own cost and by its own attorneys any suit against Farr concerning the sugar or the proceeds thereof (except a proceeding by the Receiver); and (c) that it would pay over to Farr 10% of the sum of $175,000 when and if C.A.V. finally obtained such funds (R. 21-23).

Societe Generale had no knowledge of these events of Friday, and at 10 o'clock in the morning of Monday, August 29, it presented the shipping documents and the draft to Farr for payment. Farr took the documents, purportedly for inspection; later that day, Farr refused to make payment. Societe Generale asked for the return of the documents but was told that they had already been negotiated and that Farr had received payment for them (R. 25, 26).

Societe Generale immediately protested the conversion of the draft and the failure to pay and repeated these protests on several subsequent occasions (R. 27).

On October 4, 1960, the Receiver moved to compel Farr to turn over to him the funds in its possession. On October 10, 1960, this action was commenced (R. 2). Subsequently, the Supreme Court of New York entered an order directing Farr to pay over to the Receiver the sum of $175,250.69, and this was done (R. 45).

Petitioner moved for summary judgment against Farr and the Receiver; Farr cross-moved to dismiss the complaint for lack of jurisdiction. The District Court found that it had jurisdiction, and agreed with petitioner that there were no triable issues of fact (R. 134-138). It nevertheless dismissed the complaint, thus rendering moot other pending motions (R. 150). The Court of Appeals affirmed (R. 152-189).

The grounds on which the District Court decided the case had not been argued or briefed before it. It first held that it could not "refuse enforcement to the nationalization decree because it violates the public policy of the forum", citing *Underhill* v. *Hernandez*, 168 U. S. 250, and other leading Act of State cases (R. 138). Then, it announced an exception to the established doctrine—for the first time in American jurisprudence—*i.e.*, that it was free to "examine the validity of the Cuban act under international law and refuse recognition to the act if it is in violation of international law" (R. 139). It held that in passing on the validity of the Cuban decrees there was no danger of embarrassing the Executive Branch of the Government because the State Department had, by diplomatic note, declared the decrees in question to be a violation of international law (R. 141).

Having thus sought to free itself from the familiar principles of the Act of State doctrine, the court came to the conclusion that the Cuban Act was in violation of interna-

tional law because (1) the Cuban nationalization was "not reasonably related to a public purpose", but was "in retaliation for acts by the Government of the United States, and was totally unconnected with the subsequent use of the property being nationalized" (R. 147); (2) the decrees were discriminatory against nationals of the United States (R. 147); and (3) they did not provide adequate compensation for the property nationalized (R. 148).

The Court of Appeals, likewise, disposed of the jurisdictional issue in favor of petitioner (R. 162, 163), and, likewise, agreed with the general principle of the Act of State doctrine as enunciated by this Court. However, it too avoided the application of that doctrine by finding an exception to it, although a different exception from that found by the District Court.

In reliance on its own decision in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (C. A. 2, 1954), it held that the Act of State doctrine was one of judicial abstention grounded on "the desire by the judiciary to avoid possible conflict with or embarrassment to the executive and legislative branches of our government in our dealings with foreign nations" (R. 168). Such conflict, it said, was absent here, by reason of certain correspondence, not in the record, which is alleged to have passed between the State Department and persons not parties to this action. The court held that this correspondence, although "somewhat ambiguous" created an "exception to the judicial abnegation required by the Act of State doctrine" (R. 170, 169).

Conceding that there was doubt as to whether the failure to pay compensation for property seized was a violation of international law (R. 176-181), the court found that it was a violation of international law "for a country to fail to pay adequate compensation for the property it seizes from a *particular class of aliens, when the purpose for the seizure of the property is to retaliate against the homeland*

of those aliens—and when the result of such seizure is to discriminate against them only" (R. 181. Emphasis in original).

The court proceeded to find that all of the conditions to create this exception were present in this case and hence affirmed the decision of the court below (R. 189). To reach this conclusion, the court had to treat C.A.V. as a United States corporation, although it had been incorporated in Cuba, since, as the court pointed out, "the acts of a state directed against its own nationals do not give rise to questions of international law". (R. 175)[1]

Summary of Argument

Petitioner relies on the fundamental premise that the action of the sovereign Cuban Government in nationalizing property then within its jurisdiction cannot be challenged in the courts of this country. It does not concede that an exception can be made by a court of law because the Government of Cuba is not on good terms with the United States, or on the basis of the wrongs or rights of the dispute. Hence, the decree of August 6, 1960 must be recognized as a valid governmental act. It resulted in the transfer of title, in Cuba, to the sugar in question to the Cuban Government which, by assignments not here challenged, gave to petitioner the right to recover the proceeds of the sale of the sugar.

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[1] The grounds relied on by the District Court had not been argued or briefed by any of the parties to this litigation. Farr had defended on jurisdictional grounds and by asserting that triable issues of fact existed. In the Court of Appeals, the same thing happened; Farr said it was "neutral" on the issue on which the District Court had decided the case (Farr Brief in Court of Appeals, p. 3). The burden of presenting the argument on which the Court of Appeals decided the case was assumed principally by an *amicus curiae*. The first time Farr took any position on the basic issue in the case was in its brief in opposition to the petition for a writ.

Both of the courts below recognised the validity of the general rule of law (usually referred to as the Act of State doctrine), upon which petitioner relies, but found different reasons to avoid it in this case.

I

The Act of State doctrine is sound both in law and policy and the various "exceptions" to the rule, which the courts below announced, would destroy the rule entirely, with disastrous consequences. Indeed, the difficulties presented by the decisions of the courts below are an object lesson of the unfortunate consequences which necessarily follow upon the disregard of the established rule.

The doctrine has its roots in the substantive law principle that "The very meaning of sovereignty is that the decree of the sovereign makes law." (Holmes, J., in *American Banana Co.* v. *United Fruit Company*, 213 U. S. 347, 358). Abandonment of the rule would thus violate fundamental concepts of the sovereignty of nations; it would require domestic courts to pass on issues which are essentially political in their nature; it might embarrass the Executive Branch of the Government in dealing not only with the specific situation under consideration, but with other aspects of foreign relations as well; it would require consideration of factual issues of a nature which cannot reasonably be determined in a court of law.

The Act of State doctrine is, hence, a rule of substantive law; indeed, many courts have held it to be a rule of international law.

II

Both courts below treated the Act of State doctrine as a rule of judicial abstention justified by a concern that a judicial decision might embarrass or interfere with the Executive Branch of the Government in its conduct of foreign affairs. In this limitation of the doctrine's rationale,

the courts below erred, both in their understanding of the law and in their application of the facts.

A. To hold that the Act of State doctrine is simply a rule of judicial abstention, which can be waived by the Executive, is dangerous doctrine; it would, in effect, make the courts a part of the political arm of the government and would require that they look to the Executive Branch for leave to entertain or reject a legal claim. The independence of the Judiciary from political considerations is fundamental to our system of government. It is true that one of the sound policy reasons for adherence to the Act of State doctrine is that it avoids judicial participation in problems that are primarily political and, hence, are the responsibility of the Executive Branch. This policy reason, however, is equally valid whether the Executive Branch "releases" the courts or not. Courts are not fitted to decide political questions and should not be called on to do so.

B. Even if the law were otherwise, there are no facts here justifying abandonment of a policy of judicial abstention. There is no "positive evidence" of any intent by the Executive Branch to relax the usual doctrine. The diplomatic note on which the District Court relied certainly does not evidence any such intent. The Executive Branch has denied that the private correspondence upon which the Court of Appeals relied so heavily, constitutes any intent to relax the usual doctrine.

III

Even if we assume that the Act of State doctrine is inapplicable when the act of state at issue violates international law, the courts below erred, both in law and fact, in holding that such a violation of international law exists here.

A. The record presents no question of international law because C.A.V. is a Cuban, not a United States, national, and, as the Court of Appeals has pointed out (R. 175), no

question of international law is raised by the acts of a state which are directed against its own nationals. Neither the attitude of the Cuban government, nor the fact that most of the stockholders of C.A.V. reside in the United States, can transform a Cuban national into a United States national.

B. The narrow holding by the Court of Appeals that in the factual situation here presented international law was violated was error in the following respects:

1. The Cuban nationalization decrees were not "retaliatory" but were for a public purpose and were consistent with the adoption by Cuba of a socialist form of government. Whether the decrees were in fact a retaliation against acts of the United States and, if so, whether such retaliation was justified is a political question, not a justiciable one. It is one of the merits of the Act of State doctrine that it makes decision on such issues unnecessary.

2. The Cuban nationalization decrees did not discriminate against aliens. The mere fact that aliens and citizens are not treated alike is not a violation of international law; differences in treatment are commonplace in every nation in the world. If, in this case, there had been any significant differential in treatment it would have been justified by the historical and political setting in which the Cuban revolution took place. But, in fact, there was no differential in treatment. Here again it is one of the merits of the Act of State doctrine that it makes judicial consideration of such issues unnecessary.

3. There is no rule of international law requiring that compensation be provided when property is nationalized.

IV

The Court of Appeals based its decision on excerpts from correspondence not part of the record, and a decision based on such evidence is a violation of the most elementary principles of due process of law. The

Solicitor General, in supporting the granting of a writ in this case, has said, for the Executive Branch, that the correspondence was not intended to have the meaning or effect attributed to it by the Court of Appeals.

V

Even if the Cuban decrees had violated international law, the decisions of the courts below were in error. First, even if respondent and/or C.A.V. were entitled to relief, it could only be for damages, and the court below granted restitution. Second, any relief respondent is entitled to must be pursued through diplomatic channels and not through litigation.

POINT I

The courts of the United States may not refuse to give legal effect to decrees of the sovereign government of the Republic of Cuba which nationalized property then within its own boundaries.

It is well established by a long line of cases, in this Court, in the lower federal courts, in the courts of New York State, and, indeed, in the courts of most other countries, that the courts of one country will not examine into the validity of the acts of a foreign sovereign done within its own territory. Hence, so far as our courts are concerned, the Cuban nationalization decrees were valid, petitioner was entitled to the proceeds of the sale of the sugar, and the judgment of the courts below should be reversed, and summary judgment should be entered for petitioner, there being no substantial issues of fact requiring trial.

In *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 303, this Court set forth the Act of State doctrine in the following words:

> [T]he conduct of one independent government cannot be successfully questioned in the courts of another. . . .

Even earlier, Mr. Justice Holmes, in *American Banana Co.* v. *United Fruit Company*, 213 U. S. 347, 356, said:

> . . . the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

This principle is so well established that it hardly seems necessary to indulge in extensive argument. See *Underhill* v. *Hernandez*, 168 U. S. 250; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *Shapleigh* v. *Mier*, 299 U. S. 468; *United States* v. *Belmont*, 301 U. S. 324; *The Navemar*, 303 U. S. 68; *Guaranty Trust Co. of N. Y.* v. *United States*, 304 U. S. 126; *United States* v. *Pink*, 315 U. S. 203; *Hewitt* v. *Speyer*, 250 F. 367 (C.C.A. 2, 1918); *The Claveresk*, 264 F. 276 (C.C.A. 2, 1920); *Banco de Espana* v. *Federal Reserve Bank of N. Y.*, 114 F. 2d 438 (C.C.A. 2, 1940); *United States ex rel. von Heymann* v. *Watkins*, 159 F. 2d 650 (C.C.A. 2, 1947); *Bernstein* v. *Van Heyghen Freres*, 163 F. 2d 246 (C.C.A. 2, 1947); *Pasos* v. *Pan American Airways Inc.*, 229 F. 2d 271 (C.A. 2, 1956); *Pons* v. *Republic of Cuba*, 294 F. 2d 925 (C.A. D.C., 1961); *Eastern States Petroleum Co. Inc.* v. *Asiatic Petroleum Corp.*, 28 F. Supp. 279 (S.D.N.Y., 1939).

New York State cases are in agreement. In *Salimoff & Co.* v. *Standard Oil Company of New York*, 262 N. Y. 220, 224 (1933), the Court of Appeals said:

> The courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries.

To the same effect, see *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71 (1934); *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474 (1938).

The most recent decision in New York on the subject arose out of the Cuban Revolution. In *Mann* v. *Com-*

pania Petrolera Trans-Cuba, S.A., 32 Misc. 2d 790, 792, 223 N. Y. S. 2d 900, 903 (Sup. Ct., 1961), the court said:

> Thus, this court would have no jurisdiction to interfere with the disposition of the one million peso deposit of the corporation in a Cuban bank which was seized by the interventor even if the money were ultimately brought to this country (*Salimoff & Co.* v. *Standard Oil Co., supra* [262 N. Y. 220]; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; cf. *Banco Nacional de Cuba* v. *Sabbatino*, 193 F. Supp. 375, now on appeal in the Second Circuit).

If this case is to be decided on the basis of state law, this Court would seem to be bound by these decisions. *Erie Railroad* v. *Tompkins*, 304 U. S. 64. And see footnote 16 of the Court of Appeals decision (R. 189), and footnote 8, p. 20, *infra*.

The District Court of Appeals of Florida has recently applied the Act of State doctrine in a case also arising out of Cuban nationalization of property owned by nationals of the United States. *National Institute of Agrarian Reform* v. *Kane*, 153 So. 2d 40 (Fla. App. 1963), reversing 11 Fla. Supp. 116 (Cir. Ct., Fla., 1961). The Court of Appeals for the Fourth Circuit of Louisiana likewise did so in *Theye* v. *Pan American Life Insurance Co.*, 154 So. 2d 450 (La. 1963), another Cuban matter.

The law is the same in England:

> It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country. (*Luther* v. *James Sagor & Company*, L. R. [1921] 3 K. B. 532 at 548.)

The latest decisions we have been able to find in France are in accord. *Affaire Hardmuth*, 79 Journal du Droit International 1200 (1952); *De Keller* v. *Maison de la Pensée Française*, 82 Journal du Droit International 119 (1955). The German courts agree, in a case arising out of the Indonesian seizure of tobacco plantations owned by

Netherlanders, in 1958. *N. V. Verenigde Deli-Maatschappijen* and *N. V. Senembah-Maatschappij* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft m.b.H.*, Landgericht Bremen, April 21, 1959, 1959 Aussenwirtschaftsdeinst des Betriebsberaters 105; Oberlandgesgericht Bremen, August 21, 1959, *id.* at 207. See Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 Am. J. Int'l L. 305 (1960) and Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801 (1960).[2]

A Tokyo court, considering the validity of the Iranian oil seizures of 1951, was unable to find any applicable rules of international law. *Anglo-Iranian Oil Co.* v. *Idemitsu Kasan Kabushiki Kaisha*, [1953] Int'l L. Rep. 305 at 313.

While we do not regard the attitude of the Executive Branch toward these legal issues as being decisive, it is interesting to note that on at least two recent occasions the State and Justice Departments have endorsed the Act of State doctrine. The first of these was in the *Bahia de Nipe* litigation (*Rich* v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 [E. D. Va., 1961], aff'd 295 F. 2d 24 [C. A. 4, 1961]; application for a stay denied, United States Supreme Court, September 11, 12 and 14, 1961); the second was in the General Aniline litigation. We will discuss both of these matters more fully below.[3]

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[2] The Indonesian nationalization decrees are significant; they are very similar to the Cuban decrees in language and intent; they might also be termed "discriminatory, retaliatory and without compensation." For a text of one of the most significant decrees, see *The Measures Taken by the Indonesian Government against Netherlands Enterprises*, 5 Netherlands Int'l L. Rev. 227, 230 (1958).

[3] The Act of State doctrine did not, of course, originate with *Underhill* v. *Hernandez*, *supra*. The earliest reported case applying the rule is probably *Blad* v. *Bamfield*, 3 Swan. 604, 36 E. R. 992 (1674). See also *Waters* v. *Collot*, 2 U. S. (2 Dall.), 247 (1793); *Hudson* v. *Guestier*, 8 U. S. (4 Cranch.) 293 (1808); 1 Ops. Att'y Gen. 45 (1794) commenting on *Waters* v. *Collot*, *supra*; *Hatch* v. *Baez*, 7 Hun 596 (N. Y. Sup. Ct. 1876); *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1, 49 E. R. 724 (1844), aff'd 2 H. L. Cas., 1 (1848).

The District Court was unable to cite any cases in the United States in support of its conclusion; the Court of Appeals was able to cite only the decision of the Circuit Court of Dade County, Florida, in the *Kane* case, *supra*, but that case, as is above noted, has since been reversed.[4]

The sole authorities cited by the Court of Appeals in support of the rule of international law which it created are an Italian case, a Netherlands case and a number of law review articles. The Italian case (*Anglo-Iranian Oil Co., Ltd.* v. *S.U.P.O.R.* (Rome) [1955] Int'l L. Rep. 23) actually gave the Iranian oil nationalization decree of 1951 full effect, finding adequate compensation where a more realistic court would have found none. Furthermore, the dictum quoted by the Court below is expressly based on Italian statute, not international law. See [1955] Int'l L. Rep. 23 at 42. The Netherlands case, *Senembah Maatschappij* v. *Bank Indonesia and de Twentsche Bank*, [1958] 2 Int'l L. Rep. 38 (Dist. Ct. of Amsterdam, 1958), aff'd Court of Appeals, Amsterdam, 1959 (text available in 7 Netherlands Int'l L. Rev. 400) is not in point, since the property in question was in Holland at the time of nationalization and the Indonesian nationalization decree did not purport to nationalize property outside its territories. See Baade *op cit.*, p. 801; Domke: *Indonesian Nationaliza-*

[4] There is a series of subsequent Fifth Circuit cases which rely on the decision of the Court of Appeals. *Menendez Rodriguez* v. *Pan American Life Ins. Co.*, 311 F. 2d 429 (1962), petition for certiorari pending, October Term 1963, No. 67; *Menendez* v. *Aetna Ins. Co.*, 311 F. 2d 437 (1962), petition for certiorari pending, October Term 1963, No. 68; *Tabacalera Severiano Jorge* v. *Standard Cigar Co.*, 311 F. 2d 438 (1962), petition for certiorari pending, October Term 1963, No. 78. Actually these cases go far beyond the Court of Appeals decision in this case, since none of the conditions on which the Second Circuit relied are to be found in the Fifth Circuit cases. Furthermore, discussion of the Act of State doctrine may very well have been dictum in these cases since they were all decided by the District Courts on grounds of *forum non conveniens*.

tion Measures Before Foreign Courts, 54 Am. J. Int'l L. 305, 307; Domke: *Foreign Nationalizations*, 55 Am. J. Int'l L. 585, 598, footnote 92.

POINT II

The Act of State doctrine is sound as a matter of policy; no exceptions to the rule are warranted.

Until the decision of the District Court in this case there had been no significant deviation from the literal application of the Act of State doctrine in the courts of this country.[5] Even since that decision the usual rule has been followed as applied to the Cuban situation. See *Pons* v. *Republic of Cuba*, 294 F. 2d 925 (C. A. D. C., 1961); *National Institute of Agrarian Reform* v. *Kane, supra; Theye* v. *Pan American Life Insurance Co., supra.* For some years, however, there had been some law review criticism of the rule,[6] and a modification has been proposed by a committee of the American Law Institute. (See Tentative Draft No. 4 of the Restatement of the Foreign Relations Law of the United States, § 28d(2) (1960), a proposal relied on very heavily by the District Court.) We think the criticism of the doctrine to be ill-founded; indeed, in the turbulent world

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[5] Except for *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (C. A. 2, 1954). See, *infra*, p. 25.

[6] See, for example, Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826 (1959); Fachiri, *Recognition of Foreign Laws by Municipal Courts*, 12 Brit. Yb. Int'l L. 95, 102-106 (1931); Morgenstern, *Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which Are Contrary to International Law*, 4 Int'l L. Q. 326 (1951).

of today there is more reason for its strict observance than ever before.[7]

The most fundamental reason for the Act of State doctrine goes to the essential nature of sovereignty. "The very meaning of sovereignty is that the decree of the sovereign makes law" said Mr. Justice Holmes in *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 358. Our law on this was clearly set forth by Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon et al.*, 11 U. S. (7 Cranch) 116, 133:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

The New York courts have long viewed the Act of State doctrine as being a fundamental part of international law:

> We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government, done within its own territory. *Hatch* v. *Baez*, 7 Hun 596, 599 (1876).

See also *Salimoff* v. *Standard Oil Co.*, 262 N. Y. 220, at 225 (1935). The English courts agree; the court in *In re Claim*

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[7] For a full discussion of the reasons for the Act of State doctrine, see Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 Am. J. Int'l L. 141 (1960); Lipstein, *Case and Comment on the Rose Mary*, 1956 Camb. L. J. 138; Seidl-Hohenvelden, *Extraterritorial Effects of Confiscations and Expropriations*, 49 Mich. L. Rev. 851 (1951).

of Helbert Wagg & Co. Ltd., [1956] 1 Ch. 323, at 349, found that the Act of State doctrine "rests in considerations of international law." See also *Luther* v. *James Sagor & Co.*, *supra*, at 554.

This was sound law when Marshall spoke in 1812 and when Holmes spoke in 1909; it is even more important that this be understood and applied in the world of today. The past ten years have seen the birth of scores of new states in Africa and Asia, and the militant reassertion of independence by many older states. Each of these nations is jealous of its right to govern itself without outside interference; each of them is proud of its "sovereignty". And what is the meaning of that "sovereignty" if it is not the right to govern one's self, to make one's own laws and to have these laws recognized by other members of the family of nations?

Each of these underdeveloped nations is seeking to find its own way to a better life for its people, often in complete disregard of property and even personal rights which we have long held sacred. The very issue involved here, that of the nationalization of private property is, as we shall see, one of the most critical of the problems faced by these nations. It would be disastrous for our courts to set themselves up as judges of the validity of the acts of these states. The forces of nationalism are among the most powerful forces at large in the world today and an attempt to impose judicial control on them, even when they offend our sense of justice, is doomed to failure.

There are additional important practical reasons for the application of the Act of State doctrine. Perhaps the most critical relates to the respective functions of the courts and the State Department in determining foreign policy. There probably has been no time in the history of our country when the conduct of foreign relations was so difficult as it is now. The importance of giving to the State Department a free hand in the conduct of foreign affairs, unimpeded

by judicial decisions, has never been so great. To arrogate to the courts any function which might interfere with foreign relations is a step which might be extremely perilous.

We need not look for analogies to illustrate this point, since our country's relations with Cuba and the rest of Latin America are perhaps the best example we could find. The District Court referred to certain diplomatic correspondence issued at the time of the nationalization of American property in Cuba and placed heavy reliance on those notes (R. 141). Yet, as we shall discuss more fully below (p. 26, *infra*), in a memorandum submitted to this Court about five months later in the *Bahia de Nipe* litigation, *Rich* v. *Naviera Vacuba, S.A., supra*, the State Department, speaking through the Solicitor General, took the view that the Act of State doctrine governed title to sugar nationalized *by the very decree here under consideration.*

This position was not in any degree inconsistent with the diplomatic notes of Secretary Herter on which the District Court relied. In the one case a political officer was performing a political act; in the other, a court was being asked to apply a rule of law. The difficulty arose from the fact that the District Court had confused the political functions of the Secretary of State with its own obligations as a court. We respectfully suggest that it is perhaps best if the State Department be given exclusive control over the manner in which its pronouncements are to be effectuated. It would be even more difficult to carry on our foreign relations if a Secretary of State were compelled to consider how his political actions might affect private legal rights which have not yet been asserted, or if he were to be impeded by judicial decisions which might not be in accord with his political goals.

We do not argue only that the Executive Branch may be "embarrassed" by the acts of a court in making decisions which might conflict with executive policy. Even

more important, our courts are not qualified to make such decisions, even if the Executive Branch cedes jurisdiction over them. Again, we need not search far afield for illustrations. In this very case the findings of the courts below that the Cuban nationalization decree was "discriminatory" and "retaliatory" were political findings, not based on any evidence in the record and made without a full understanding or consideration of the political forces at work. As we shall see (pp. 38-45, *infra*), the conclusions of the courts below are, to put it mildly, arguable—but the argument is a political, not a justiciable one.

The Court of Appeals seemed to glimpse some of this difficulty in commenting on the "tremendous social and cultural changes [which] are occurring in many parts of the world today" (R. 180) and the relationship of such changes to the problem of compensation for nationalized property. We suggest that similar considerations affect concepts such as "discriminatory" or "retaliatory" legislation. We shall discuss these matters more fully below; we mention them now merely to illustrate our argument that the issues are political in their nature and that they remain so even when (as has not happened in this case) the Executive Branch is willing to give up its responsibility to decide these issues and to pass that responsibility to a court.[8]

We do not suggest that the property owner is without redress. There is a time-honored and currently observed method for handling these problems. The remedy is through

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[8] A most disturbing additional problem is raised but not answered by the last footnote in the decision of the Court of Appeals (R. 189). It is there suggested that state law might govern this type of situation. If so, we will have not one court but fifty with jurisdiction to decide these difficult and delicate questions. Of course, as has been noted the New York State courts have long accepted the Act of State doctrine, and have indicated an intent to continue to apply it in the current Cuban litigation. See pp. 12 and 17, *supra*.

diplomatic channels, and the relief is damages for the injury suffered. There is no remedy in the courts, and certainly no relief by way of restitution. See Point V, *infra*.

We add a few words to dispel any notion that the dispute over the application of the Act of State doctrine has moral implications and that the effect of the doctrine is to protect predatory wrong-doers from the justice meted out by our courts. Of course, investors in foreign countries may feel morally outraged at the possible loss of investments through confiscatory decrees. But the past years have demonstrated that their sense of outrage is matched by that of a colonial or semi-colonial people who feel that they have long been exploited by these same investors. This moral issue is certainly not one for evaluation by our courts.

Furthermore, it is not only new or semi-colonial countries who have relied on the Act of State doctrine to defend confiscatory decrees. Indeed, our nation, the greatest investor nation in the world, has also called upon the same doctrine for its protection and has relied on it before international tribunals.

The most noteworthy recent illustration arose in the course of the complex litigation over the assets of General Aniline & Film Corp., some aspects of which have come before this Court, *Societe Internationale* v. *Rogers*, 357 U. S. 197. That litigation arose out of the seizure by the United States of assets of General Aniline & Film Corp. on the ground that it was a German-owned corporation. The United States rejected a Swiss demand that the matter be submitted to arbitration under a 1931 treaty (47 Stat. 1983; T. S. 844), citing the Act of State doctrine in support of its contention that the 1931 Treaty was not applicable. Said the State Department:

> The disposition of title to property located within a country is manifestly within the domestic juris-

> diction of that country unless the country involved has by sovereign act removed the matter from its exclusive domestic jurisdiction. The United States has not removed the matter of the ownership of these shares in General Aniline & Film Corp. from its domestic jurisdiction (36 Dep't State Bull. 350, 357 [1957]).

The property there in question was property of aliens; hence the same problems of international law are implicit in that record as those found by the courts below in this case.

Another situation comes readily to mind. The Gold Clause Resolution of June 5, 1933 (31 U. S. C. §§ 462, 463) resulted in the confiscation of a substantial portion of the value of United States Government bonds. *Perry* v. *United States*, 294 U. S. 330. To the extent that such securities were held by aliens, serious questions of international law might well have been raised. Such, at least, was the opinion of responsible commentators in the United States at the time. See, for example, editorial comment, 29 Am. J. Int'l L. 310 (1935).

The element of confiscation present in the Gold Clause Resolutions did not escape the attention of foreign governments. In its correspondence with the United States relating to protests over the implementation of the Mexican Agrarian Reform Law, the Mexican government, in a note dated September 1, 1938, argued that a sovereign government could confiscate property without compensation and then went on to say:

> There are numerous examples of nations whose cultural progress is beyond discussion, which have been obliged, without repudiating the right of property in the abstract, to issue laws which have signified expropriation without immediate payment and sometimes without later compensation. Countries might be mentioned which, under pressure of reasons considered to be of public necessity, have forced private individuals to exchange their gold and their gold

> certificates for money which has already been depreciated, or which was depreciated immediately afterward. Those countries have also been under necessity to require private persons, without distinguishing between nationals and foreigners, to receive in payment of obligations, which had been contracted in gold, the already depreciated currency of the country. Because expropriation was indirect in these cases it was none the less effective, since the owners of gold and gold certificates in the first example, or of credits payable in gold, in the second one, have seen their property diminish without receiving adequate compensation in return. Notwithstanding that each time that measures of this character have been decreed, there have not been lacking those who described it as "confiscation pure and simple," and notwithstanding the fact that they must have caused loss of confidence in investors and serious disturbances in commerce, the courts of the various countries justified them, in view precisely of the reasons of a superior order and of the public interest which inspired the said measures and the necessity of maintaining the equilibrium of the national economy. It is true that when these emergency measures were adopted by countries which were economically weak, which desired to pay off their obligations, contracted in gold, with depreciated currency, the creditor nations, representing their nationals, denounced the debtor countries before the Permanent Court of International Justice, accusing them of being transgressors against right, but later the same powerful countries which did so could not avoid having recourse to the measures which they had criticized so severely, for the purpose of solving their own problems. ([1938] 5 For. Rel. U. S. 698.)

Notwithstanding the confiscatory effect of the Gold Clause Resolutions, the action of the United States was immune from attack by reason of the Act of State doctrine

and this was generally recognized.[9] The acts of the government of Cuba are entitled to no less respect than the acts of other and more powerful nations.

POINT III

The Act of State doctrine is not a rule of judicial abstention and even if it were, there has been no waiver of that rule in this case.

Both courts below regarded the Act of State doctrine as a rule of judicial abstention from interference with the Executive Branch of the Government. They further held that they could be and, in fact, in this case were, relieved from the duty to abstain in this case. The District Court relied on diplomatic correspondence to reach this conclusion (R. 141). That correspondence consisted merely of a note to the Cuban government protesting the seizure of American-owned property (43 Dep't State Bull. 171, [1960]). In diplomatic terms, it was a routine political act, having no reference to this litigation. The Court of Appeals abandoned that slim reed and instead relied on private correspondence between persons not parties to the litigation and several representatives of the Executive Branch (R. 169, 170).

We disagree, both on the law and the facts. We have already argued the reasons for the Act of State doctrine and have noted that the dangers of judicial interference in political affairs are in no way lessened because the Executive Branch may sometimes be prepared to abdicate its responsibility.

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[9] As the Court of Chancery noted in *In re Claim of Helbert Wagg & Co.* [1956] 1 Ch. 323, 349, this issue was implicit in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A. C. 500, but was not raised because, the Chancery Court thought, it was obvious that the Gold Clause Resolution is well within the sovereign power of the United States even though it resulted in the "confiscation" of the property of aliens.

The Court of Appeals, in concluding that the doctrine was merely one of judicial abstention, relied on the two *Bernstein* cases, *Bernstein* v. *Van Heyghen Freres*, 163 F. 2d 246 (C. C. A. 2, 1947) *cert. denied*, 332 U. S. 772, and *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (C. A. 2, 1954). Neither of these cases came before this Court. The language of the first case on which the second relied was dictum. The *Bernstein* cases were in fact sports. They were hard cases which made bad law. The governmental acts in these cases were a part of the program of the Hitler government to strip all Jews of their property and the record alleged use of imprisonment and torture to coerce Bernstein to surrender his property. The cases did not come before the courts until the war was over, and the regime which had perpetrated these outrages was no longer in existence. No such situation is even remotely presented here and heavy reliance on those cases is totally unjustified.

Of course, even if the dictum in the first *Bernstein* case be regarded as good law, we have here no "positive evidence of . . . an intent [to relax the Act of State doctrine]" (*Bernstein* v. *Van Heyghen*, *supra*, at p. 251). Whatever interpretation one may have originally been able to put on the correspondence on which the Court of Appeals relied, the matter was put to rest by the Memorandum submitted by the Solicitor General in support of the petition for certiorari herein. The assumption of the Court of Appeals that it had before it a "Bernstein letter" was, the Solicitor General said, "erroneous" (Memorandum for the United States submitted by the Solicitor General, p. 7). The correspondence on which the Court of Appeals relied was not "an official expression of the views of the Executive Branch" (*id.*, p. 10).

Thus, even if "positive evidence" of a "positive intent" is sufficient to relax the doctrine, it is not present

here. Indeed, the only expression we have thus far from the Executive Branch is a positive intent to apply the Act of State doctrine to the Cuban decrees. This view was expressed in the litigation involving the *Bahia de Nipe*, a Cuban ship whose cargo of sugar was attached by the former owner thereof, United Fruit Sugar Company. *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E. D. Va., 1961), aff'd 295 F. 2d 24 (C. A. 4, 1961), applications for stay denied, United States Supreme Court, September 11, 12 and 14, 1961. United Fruit's position with respect to that cargo of sugar was precisely the same as the position of C.A.V. with respect to the cargo involved in this case; it too had been nationalized by the decree of August 6, 1960. On a petition by United Fruit Company for a stay pending an application for a writ of certiorari to the Court of Appeals for the Fourth Circuit, the Solicitor General filed an extensive memorandum of law on September 11, 1961,[10] expressly stating that the views set forth were those of both the Justice Department and the State Department. The Solicitor General urged a denial of the stay on the standard Act of State cases, advising this Court that it could not, under our law, refuse recognition to the very nationalization decrees involved in this case. The Solicitor General said at pp. 3, 4 of his memorandum:

> Petitioner, in effect, seeks redress in this proceeding for the expropriation of its property allegedly owned by it in Cuba. But no such redress is available here. It may be assumed that the confiscation is unlawful under international law, *i.e.*, so far as relations between the Governments of the United States and Cuba are concerned. But that does not mean that Cuba, as between itself and petitioner, does not have valid title to the expropriated property so far as our courts are concerned.

[10] The memorandum submitted by the Solicitor General is, of course, not officially reported. It does appear in the files of this Court and has been reprinted in full in 1 Am. Soc. Int'l L., International Legal Materials, 276, 302-305 (1962).

The Solicitor General then discussed the standard act-of-state cases and went on to say:

> This act-of-state doctrine prevents any inquiry by our courts into the acts of the Cuban Government in Cuba which, in this case, may have resulted in the expropriation or confiscation of sugar or other property owned by petitioner in Cuba. And assertion that its property was seized without legal justification and without due process of law in violation of the Fifth Amendment is of no aid to petitioner. *United States* v. *Pink*, 315 U. S. 203, 228. [The memorandum then discussed and quoted from *Pons* v. *Republic of Cuba*, 294 F. 2d 925 (C.A.D.C. 1961)].
>
> This doctrine applies with full force to preclude judicial review, in domestic courts, even where the act of the foreign state is asserted, as here, to be in conflict with or in violation of international law.

The application for a stay was accordingly denied by the Chief Justice, in reliance on the *Underhill* and *Ricaud* cases, *supra*. We do not know of any distinction between the claim of the Cuban government in that litigation and the claim of petitioner here.

POINT IV

Assuming that the Act of State doctrine is subject to exception when the Act of State violates international law, no such violation appears here.

A. The record presents no question of international law.

As the Court of Appeals said, "... acts of a state directed against its own nationals do not give rise to questions of international law" (R. 175). Hence, unless C.A.V. be treated, not as a Cuban national, but as a national of the United States, no violation of international law can be found here and the decisions below must be reversed.

In determining the nationality of C.A.V., the Court disregarded its corporate identity and looked to the purported

nationality of its stockholders. This was erroneous in two respects: first, the nationality of a corporation is determined by its place of incorporation and not by the nationality of its stockholders, and, second, there is no evidence in the record as to the nationality of C.A.V.'s stockholders.

The municipal law of the United States has been absolutely clear at least since *Louisville C. & C. R. R. Co.* v. *Letson*, 43 U. S. (2 How.) 497. The courts will not look behind the corporate entity in determining the nationality or citizenship of a corporation. *The Pedro*, 175 U. S. 354 concerned the condemnation of a Spanish vessel as a prize during the Spanish-American War. A claim was made on behalf of British nationals who asserted beneficial ownership of *all* of the stock of the corporation which owned the vessel. This court affirmed the condemnation decree, stating, at p. 368:

> These stockholders were in no position to deny that when they elected to take the benefit of Spanish navigation laws and the commercial profits to be derived through discriminations thereunder against ships of other nations, they also elected to rely on the protection furnished by the Spanish flag.

See also *United States* v. *Northwestern Express Co.*, 164 U. S. 686; *People of Puerto Rico* v. *Russell & Co.*, 288 U. S. 476.

In *Behn, Meyer & Co. Ltd.* v. *Miller*, 266 U. S. 457, this Court went even further, in applying the Trading with the Enemy Act of 1917, c. 106, 40 Stat. 411. It there held that a corporation incorporated in a British Colony was not an enemy alien in the First World War even though most of its stockholders were of German nationality. Cf. *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480.[11]

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[11] An amendment of the Act was required to correct this situation. See First War Powers Act of 1941, 55 Stat. 839, 50 App. U. S. C. §§ 601-622.

British law is equally explicit. In *Kunigl* v. *Donnersmark* (1955), 1 Q. B. 515, 535-6, the court stated:

> I think it is also clear that, insofar as nationality can by analogy be applied to a juristic person its nationality is determined in an inalienable manner by the laws of the country from which it derives its personality.

To the same effect is *Janson* v. *Dreifontein Consolidated Mines, Ltd.* [1902], A. C. 484. Lord Macnaghton said, at 497:

> I assume that the corporation . . . was to all intents and purposes in the position of a natural-born subject of the late South African Republic. I do not think it can be entitled to any exceptional favour or to any peculiar indulgence by reason of the fact, if it be a fact, that the bulk of its shareholders were of European nationality. If all of its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien.

Lord Brampton, at 501, noting that although a majority of the shareholders were British and the company had an office and a committee of management in England, said: "The company clearly must be treated as a subject of the [South African] Republic notwithstanding the nationality of its shareholders." Lord Lindley, at 505, agreed:

> If it becomes material to attribute nationality to the company it would, in my opinion, be correct to say that the company was a Transvaal Company and a subject of the Transvaal Government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries.

The authorities relied upon by the Court of Appeals are of two sorts: (1) matters in which a government used its good offices or interposed a claim on behalf of a foreign corporation whose stockholders were nationals of the com-

plaining government, and (2) arbitral awards in which the issue was dealt with.

In making diplomatic claims on behalf of its nationals, a government acts as an advocate; furthermore, it is pressing a political, not a legal, claim. The mere assertion of such a claim is not authority that it has validity under public international law. The practice of the United States has by no means been consistent even in this limited area. The earlier policy was to make no claim on behalf of United States citizens who were shareholders of aggrieved foreign corporations. *The Antioquia* (1865), VI Moore, *Digest Int'l L.* 644 (1906); *Peruvian Nitrate Deposits* (1875) VI *id.* at 646; and see III *id.* at 800-804.

Later, the United States, on occasion, did make such claims, but appears in each case to have made clear that it was acting for the American stockholders, not the foreign corporation. This seems to be true as to most of the cases to which the United States was a party, which are cited by the Court of Appeals at R. 176. Thus, in the *Tlahualilo* case [1913] For. Rel. U. S. 993, both the United States and Great Britain interposed claims against Mexico on behalf of security holders and demanded arbitration. Mexico resisted, on the ground that the corporation was Mexican. The dispute was settled by an agreement between the Mexican government and the company. The United States was not a party to the settlement.

In *El Triunfo*, [1902] For. Rel. U. S. 859, the same was true, *i.e.*, the United States made a diplomatic claim, not on behalf of the Salvadoran corporation which alleged that it had suffered a loss, but on behalf of those of the stockholders who were American nationals. The issue of damages was submitted to arbitration by agreement; there was no discussion of the nationality of the corporation and no need to discuss it.

The *Delgoa Bay Railway Company* matter, [1902] For. Rel. U. S. 848, also involved interposition by the United

States and Great Britain, this time against Portugal. Again the claim was interposed on behalf of American and British citizens, not on behalf of the corporation. Portugal resisted, claiming that the aggrieved party was a Portuguese corporation, rather than the American and British nationals who had a financial interest in it. Ultimately the dispute was arbitrated, again under a protocol which submitted only the question of damages to the stockholders, not to the corporation.

As noted, in both the *Tlahualilo* and *Delgoa Bay*, Great Britain joined with the United States in pressing the claims of their citizens who were stockholders in foreign corporations. When the United States pressed a similar claim against Great Britain, however, the latter resisted it. In the *Romano-Americana* case, where property of a Roumanian subsidiary of Standard Oil Company of New Jersey had been destroyed in World War I by the Roumanian government under the direction of a British officer, the United States claimed indemnity from Great Britain. The British view was that interposition was not justified:

> The ownership of the shares, even if it extended to the totality of the shares, by an American corporation would not in the opinion of this Government justify the diplomatic protection of the Rumanian company by the Government of the United States on the footing that it was an American national. ([1926] For. Rel. U. S. 308.)

Ultimately a settlement was arrived at between the company and the British Government, to which the United States was not a party, [1926] For. Rel. U. S. 308, 335.

The *Allsop* case, [1910] For. Rel. U. S. 146, 148-149, is similar to *Delgoa Bay Railway*. The United States asserted a claim against Chile on behalf of American members of a Chilean company. Chile vigorously objected, calling attention to the fact that in two prior arbitrations it had been held that the claim of Allsop & Co. had no international

implications. As in the *Delgoa Bay Railway* case, the dispute was ultimately submitted to arbitration on the issue of damages alone.

Charbonnage Frederic Henri S.A. v. *Germany* [1919-22] Ann. Dig. 227, is based exclusively on an interpretation of Article 297e of the Treaty of Versailles; it does not, and does not purport to set down a general rule of law. *Baron de Neufliese* v. *Germany* [1927-28] Ann. Dig. 323, is totally irrelevant; it does not support, in any way, the proposition for which it is cited.

The only conclusion that can be drawn from these cases is that states whose nationals had an interest in foreign corporations have frequently made claims on their behalf, and the states against which the claims were asserted have generally denied their propriety. In none of the cases cited by the Court of Appeals does an arbitration tribunal appear to have even considered the issue of the nationality of the corporation involved.

Of far more significance are the awards in international arbitrations where the issue was considered by disinterested tribunals. None of these cases is cited by the courts below. The most striking is the *Standard Oil Tankers* case, [1927] Brit. Yb. Int'l L. 156. As part of reparations after World War I, Germany was required to turn over to England and France all merchant vessels within a described class. In compliance, Germany delivered, among others, a number of tankers owned by a German corporation, more than 99 per cent of whose stock was owned by Standard Oil Company of New Jersey. Standard Oil was understandably displeased that what it considered its property should be used to pay German reparations. The matter was arbitrated between the United States and the Reparation Commission. The arbitrators held that Standard Oil Company, as stockholder of the German corporation, had no interest in the ships. The award is significant for three reasons: it dealt with an extreme situation where a corpo-

ration owned by nationals of an Allied power had to bear the economic burden of paying German reparations, the award contains extensive discussion of all the major precedents (including a distinction of most of the cases cited by the courts below), and it is one of the most recent authorities on the subject.

Other awards reaching the same result need only be mentioned: *Henry Chauncey* v. *Chile, No. 3*, U. S. and Chilean Claims Comm. (1901), III Moore, *Digest of Int'l L.* 802 (1906); *Chamberlain & Hookham, Ltd.* v. *Solar Zahlwerke*, [1919-22] Ann. Dig. 344; *Oestereichische Credit Anstalt* v. *Yugoslavia*, [1927-28] Ann. Dig. 324; *Baasch & Roemer*, Ralston, *Venezulean Arbitrations of 1903*, 906, 909 (1904); *Henriquez, id.* at 910; *Brewer, Maller & Co., id.* at 595, 597; *Daniel* v. *Commissioners*, 2 Knapp's P. C. Rep. 23 (1825); *Lang* v. *Commissioners*, 2 Knapp's P. C. Rep. 51 (1823).[12]

The commentators are quite uniform in concluding that the nationality of a corporation, in Anglo-American law, is that of the state of incorporation. We know of no significant authority to the contrary. Farnsworth, *The Residence and Domicile of Corporations* 312 (1939); Cheshire, *Private International Law* 276, n. 3 (7th Ed., Lauterpacht, 1952); Starke, *Introduction to International Law* 256 (4th Ed. 1958); Borchard, *Diplomatic Protection of Citizens Abroad* 623-624 (1916).

An additional point must be made. The statement by the Court of Appeals that "over ninety per cent of C.A.V.'s shareholders were United States nationals" (R. 175) has no foundation at all in the record. The record refers only to the *residence* of the shareholders (R. 44). In view of the extensive migration of wealthy Cubans to the United States since the revolution, there may be a vast difference between the residence and nationality of the stockholders.

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[12] The last two cases arose out of a nationalization which, we believe, was not compensated for, was retaliatory and discriminatory against certain aliens—in the French Revolution.

Finally, we must note the many problems arising from this unprecedented holding by the Court that the nationality of a corporation can be determined by the nationality of its stockholders in an action in which the corporation *qua* corporation is making a claim. How large a proportion of stockholders will be required to change the nationality of a corporation? How is a court to determine the nationality of the stockholders of a corporation—must it take evidence as to the citizenship of each stockholder?[13] How is a corporation to be treated when the stockholders are of many nationalities? Does the proportion of stockholders who are alien to the nationalizing state affect the amount of the judgment?

B. The findings of the courts below, that international law was violated by the Cuban decree, were in error.

We shall hereafter assume, without conceding, that a domestic court may sit in judgment on the acts of a foreign sovereign to apply substantive rules of international law. We further assume that C.A.V. is a national of the United States so that an international law question may be said to exist on this record. These assumptions create a series of problems quite beyond the competence of any court to solve, requiring as they do the exploration of political and economic questions which are not in any sense justiciable.

The Court must first find substantive standards of international law to apply. International law is generally defined as those rules of conduct which states commonly observe in their relations with each other. Thus, 1 Hyde's *International Law* (2d Rev. Ed. 1945) opens with this sentence (p. 1):

> The term international law may be fairly employed to designate the principles and rules of conduct declaratory thereof which States feel themselves bound to observe and, therefore, do commonly observe in their relations with each other.

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[13] According to the record (R. 44) there were about 6,000 stockholders of the company, and 1,443,921 shares outstanding.

1 Oppenheim's *International Law* (Lauterpacht's 8th Ed. 1955) states:

> The sources of International Law are therefore twofold, namely: (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, that is, implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct. (p. 25).

Unless international law reflects the general practice of the nations of the world, it has no meaning at all. The writings of learned scholars, and practicing attorneys, unless they reflect actual practice, are likely to be merely theories as to what the law ought to be in an idealized international community.[14] Even if all of the writers were to agree on proper principles of international law (and they do not), such principles would not become international law without general concurrence of the nations of the world. This principle has been recognized by this Court in a much more difficult case than the present one. *The Antelope*, 23 U. S. (10 Wheat.) 66. The Court of Appeals, incidentally, seemed to recognize that it was disregarding that most striking opinion of Chief Justice Marshall (R. 174).[15]

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[14] This Court has said, concerning the writings of jurists and commentators in the field of international law: "Such works are resorted to, not for the speculations of their author concerning what the law ought to be, but for the trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U. S. 677, 700.

[15] We do not quite understand what the Court of Appeals means when it says (R. 174): "International law is derived indeed from the customs and usages of civilized nations, but its concepts are subject to generally accepted principles of morality whether most men live by these principles or not." As this Court pointed out in *The Antelope*, there is regrettably a vast difference between the customs and usages of civilized nations and generally accepted principles of morality. But it is the former, not the latter, which constitutes international law.

The Court of Appeals here announced a rule of international law (R. 181, 187). There is no authority for any such rule to be found in international practice and the court cites none. An analysis of the several elements of the law thus created by the Court of Appeals shows that none of these elements is sound and that in combination they have even less justification.

A preliminary word may be in order. There are probably no more difficult problems in the field of international law than those associated with the right of a sovereign nation to nationalize property within its borders. The literature on the subject is voluminous and in sharp conflict.[16] And the problem is not an academic one—almost

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[16] For a sampling see: *Books*—Domke, *International Aspects of European Expropriation Measures* (1941); Duke University Law School, *The Nationalization of British Industries* (1951); Einaudi, Bye and Rossi, *Nationalization in France and Italy* (1955); Foighel, *Nationalization; A Study in the Protection of Alien Property in International Law* (1957); Friedman, *Expropriation in International Law* (1953); Kunz, *The Mexican Expropriations* (1940); Macmahon and Dittmar, *The Mexican Oil Industry Since Expropriation* (1942); Nishoff, *Confiscation in Private International Law* (1956); Re, *Foreign Confiscations in Anglo-American Law* (1951); Standard Oil of New Jersey, *Denials of Justice* (1940); U. S. Dep't of State, *Compensation for American-Owned Lands Expropriated in Mexico* (1939); G. White, *Nationalization of Foreign Property* (1961); Wortley, *Expropriation in Public International Law* (1959).

Articles—Abdel-Wahab, *Economic Development Agreements and Nationalization*, 30 U. Cinc. L. Rev. 418 (1961); Allison, *Cuba's Seizure of American Business*, 47 A. B. A. J. 48 (1961); Baade, *Expropriation of Foreign Private Property and The Decline of the Act of State Doctrine*, 1963 J. Bus. L. 182; Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, 53 Am. Soc. Int'l Proc. 336 (1959); Dawson and Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 Fordham L. Rev. 727 (1962); Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 Am. J. Int'l L. 585 (1961); Domke and Baade, *Nationalization of Foreign-Owned Property and the Act of State Doctrine—Two Speeches*, 1963 Duke L. J. 281; Drucker, *Compensation Treaties Between Communist States: An Addendum*, 10 Int'l and Comp. L. Q. (1961); Dunham, *Griggs* v. *Allegheny County* (82 Sup. Ct. 531) *in Per-*

every underdeveloped country is considering or has already effectuated nationalization of private property to one extent

spective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63; Fachiri, *Expropriations and International Law*, 1952 Brit. Int'l L. 15; Graving, *Shareholder Claims Against Cuba*, 48 A. B. A. J. 226 (1962); Katzarov, *Validity of the Act of Nationalisation in International Law*, 22 Modern L. Rev. 639 (1959); Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 Fordham L. Rev. 177 (1959); Kutner, *Habeas Proprietatim: An International Remedy for Wrongful Seizures of Property*, 38 U. Det. L. J. 419 (1961); Lee, *Proposal for the Alleviation of the Effects of Foreign Expropriatory Decrees. Upon International Investments*, 36 Can. B. Rev. 351 (1958); Mann, *Outlines of a History of Expropriation*, 75 L. Q. Rev. 188 (1959); Metzger, *Act of State Doctrine and Foreign Relations*, 23 U. Pitt. L. Rev. 881 (1962); Nugent, *Notes on Compensation and Expropriation*, 33 Man. B. News 57 (1961); Patty, *Tax Aspects of Cuban Expropriations*, 16 Tax L. Rev. 415 (1961); Re, *Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 Mich. L. Rev. 1079 (1962); Reeves, *Cuban Situation: The Political and Economic Relations of the U. S. and Cuba*, 17 Bus. Law 980 (1962); Rheinstein and Wortley, *Observations on Expropriation*, 7 Am. J. Comp. L. 86 (1958); Schubert, *Compensation Under New German Legislation on Expropriation*, 9 Am. J. Comp. L. 84 (1960); Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation: Critical Comments*, 7 Am. J. Comp. L. 541 (1958); Timberg, *Expropriation Measures and State Trading*, 55 Am. Soc. L. Proc. 113 (1961); Todd, *Winds of Change and the Law of Expropriation*, 39 Can. B. Rev. 542 (1961); Wadmond, *Judicial Protection of Property Abroad*, 16 Bus. Law 688 (1961); Williams, *International Law and the Property of Aliens*, Brit. Yb. Int'l L. 1 (1928); Wortley, *Protection of Property Situated Abroad*, 39 Tul. L. Rev. 739 (1961).

Notes—Act of State Doctrine—Its Relation to Private and Public International Law, 62 Colum. L. Rev. 1278 (1962); *Act of State Doctrine—A New Look*, 11 De Paul L. Rev. 76 (1961); *"Act of State" v. International Law*, 13 Mercer L. Rev. 370 (1962); *Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607 (1962); *Expropriation—Consequential Damages Under the Constitution*, 19 La. L. Rev. 491 (1959); *Foreign Nationalization: A Statutory Remedy in New York*, 13 Syracuse L. Rev. 555 (1962); *Foreign Seizure of Investments: Remedies and Protection*, 12 Stan. L. Rev. 606 (1960); *International Law: A Qualification of the Act of State Doctrine*, 4 Ariz. L. Rev. 79 (1962); *Investment Guaranty Program and the Problem of Expropriation*, 26 Geo. Wash. L. Rev. 100 (1959).

or another. That there is a difference of opinion among nations of the world as to the principles to be followed is, as we shall see, an understatement. *The only principle on which there is virtually unanimous agreement is that a state may nationalize property within its borders.* Certainly it cannot fairly be said that there exist today any "rules of conduct . . . which states feel themselves bound to observe" which provide any measure of protection for the owner of property which has thus been nationalized.

It must be kept in mind that the twentieth century is not the nineteenth. Nicholas Doman, in discussing European nationalizations, said:

> Post-war nationalization represents a revolutionary development and it would be futile to attempt to associate it with past legal concepts. Rather it should be looked upon as a *sui generis* matter and be dealt with accordingly. (Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 Colum. L. Rev. 1125, 1128 [1948].)

We shall proceed to a discussion of the rule of law announced by the court below.

1. *The Court of Appeals found the legislation to be discriminatory against a specific class of aliens. This is not so and even if it were it would not be a violation of international law.*

It must be conceded that in its nationalization policy the Cuban government has not discriminated against aliens. Beginning with the Agrarian Reform Act of May 17, 1959, and continuing to the present, the Cuban Government has adopted a series of nationalization laws, decrees and resolutions, of which the decrees under consideration were only a part. The Court of Appeals recognized that Cuban as well as United States property has been nationalized (R. 185). Indeed, the few instances cited by the courts

below could be enormously extended.[17] Cuba today is a

[17] The series of Cuban nationalization laws and decrees have been widely discussed, in general terms, by the voluminous literature on the subject. See, for example, for opposing points of view, on the one hand: Huberman and Sweezy, *Anatomy of a Revolution* (1960); Williams, *The United States, Castro and Cuba* (1962); Morray, *The Second Revolution in Cuba* (1962); and on the other, Phillips, *Cuba: Island of Paradox* (1960) and Smith, *The United States and Cuba* (1960).

The easiest reference in English to the specific nationalization decrees can be found in the files of the New York Times. Zeitlin and Scheer, *Cuba: Tragedy in Our Hemisphere* (1963) likewise contains much material on the subject. It is clear that nationalization decrees were passed both before and after the August 6 decree which is involved in this case. For example, the Agrarian Reform Act which nationalized most large Cuban landholdings, regardless of owner, was passed on May 17, 1959 (New York Times, May 18, p. 8, col. 3; May 19, p. 1, col. 6). Zeitlin and Scheer, *op. cit.*, point out at page 124 that: "In comparison with expropriations of Cuban-owned land, . . . seizures of U. S.-owned land were meager". Large amounts of property of Battista supporters, all of them Cubans, were nationalized on December 22, 1959 (New York Times, December 23, p. 1, col. 8). Cuban-owned match factories were nationalized on January 4, 1960 (New York Times, January 5, p. 10, col. 4).

Other nationalizations, including Cuban, American, Chinese and Canadian properties, were effectuated as follows: Cuban television and radio stations February 22 and March 26, 1960 (New York Times, February 23, p. 3, col. 1; March 27, p. 30, col. 1); the Cuban molasses industry, February 16, 1960 (New York Times, February 17, p. 12, col. 4); Cuban Telegraph Company, March 1, 1960 (New York Times, March 2, p. 12, col. 4); Cuban hotels both American and Cuban owned, June 11, 1960 (New York Times, June 12, p. 1, col. 7); United States owned fertilizer plants, July 16, 1960 (New York Times, July 17, p. 19, col. 1; the Cuban Electric and Cuban Telephone Companies, August 7, 1960 (New York Times, August 8, p. 1, col. 6); the Chinese (Taiwan) owned bank, September 5, 1960 (New York Times, September 6, p. 18, col. 4); United States banks, September 16, 1960 (New York Times, September 17, p. 11, col. 1; September 18, p. 39, col. 8); the Cuban tobacco industry, September 16, 1960 (New York Times, September 17, p. 11, col. 1); Cuban owned banks, sugar mills, distilleries, chemical companies, textile factories, rice mills, department stores, construction industries, shipping companies, etc., October 13, 1960 (New York Times, October 15, p. 1, col. 8); rental housing, October 19, 1960 (New York Times, October 20, p. 9, col. 6); Canadian banks, December 8, 1960 (New York Times, December 9, p. 1, col. 2).

socialist country and substantially all of the means of production, transportation, communications and distribution has been nationalized down to the level of the retail store and multiple family dwellings.

This is not denied by the Court of Appeals. The discriminatory treatment found by it is apparently one of timing. The court concedes that "If the ultimate effect of all the expropriations by the Castro Cuban government was to treat Cuban-owned enterprises and American-owned enterprises exactly alike, it would be difficult for this court to find discrimination against American nationals" (R. 185). We submit that the ultimate effect of the totality of Cuban decrees *was* to treat all large enterprises exactly alike whether they were Cuban or American.[18]

The court below attaches great significance to the fact that nationalization of C. A. V.'s property occurred on August 6, 1960, whereas some other property was not seized until October 13, 1960 (R. 185). Although the court does not mention it, much other property was nationalized *prior* to August 6. See footnote 17, *supra*. In any event, we do not understand the significance which the court attaches to the sequence of events. There is no rule of international law which states that when a country nationalizes its major industries, it must accomplish this on a single day, nor have we ever heard of any nation which has acted

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[18] As a matter of fact, even the immediate result of the decree of August 6, 1960, was less "discriminatory" than might appear. Its effect was to nationalize almost all of the largest Cuban sugar mills. Nine out of the ten largest sugar mills in Cuba and 17 of the 20 largest were nationalized by the August 6 decree. The mills left over for subsequent nationalization represented the smallest sector of the industry. Farr & Co., *Manual of Sugar Companies* (1958); *Villarejo, American Investment in Cuba*, New University Thought 79, 80, 81 (Spring, 1960).

in that fashion.[19] Certainly, the failure to transform Cuba from a capitalist country to a socialist country by way of a single law, effective on a single day, cannot have the extraordinary consequences imposed by this Court.

But let us assume *arguendo* that American-owned enterprises and Cuban-owned enterprises were not treated the same. Unequal treatment is not the same as discrimination. The Bremen Court of Appeals, in commenting on the Indonesian tobacco seizures, said:

> . . . the equality concept means only that equals must be treated equally and that the different treatment of unequals is admissible . . . For the statement to be objective, it is sufficient that the attitude of the former colonial people toward its former colonial master is of course different from that toward other foreigners. Not only were the places of production predominantly in the hands of Netherlanders, for the greater part colonial companies, but these companies dominated the world-wide distribution, beyond the production process, through the Dutch markets. (*N. V. Verenigde Deli-Maatschapijen* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft*, *supra*, p. 14, text from Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 Am. J. Int'l L. 305, 315 [1960]).

This language could be applied to Cuba almost literally. Yet the court gave no consideration at all to this problem. If a court is to consider such issues at all (and we do not believe it should—see Point I, *supra*), it must consider the political, social and economic factors which might justify a differential in treatment. It is absurd to say a nation must treat citizens and aliens alike on pain of violating international law. No nation acts in this way in matters of nationalization, any more than in respect to the right to practice a profession, the right to vote, the right to a passport, etc.

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[19] The first nationalizations decreed by the Soviet Union seem to have been on December 14, 1917; other decrees followed from time to time, and nationalization was not completed until 1920. Carr, *The Bolshevik Revolution*, 1917-1928, Vol. II at 43, 75, 99, 128, 129 and *passim* (1952).

Is it proposed that this Court or the District Court be required to determine whether, in a revolution taking place in a given historical situation, a statute providing differential in treatment to aliens is a violation of "generally accepted principles of morality" (R. 174)? This, we submit, is far beyond the competence of any court of law. Such questions are best left to the verdict of history.

2. *The Court of Appeals found the legislation to be retaliatory. This is not so and even if it were it would not be a violation of international law under the circumstances here presented.*

The preamble to Law No. 851 cites enactment of the law was prompted by the "attitude assumed by the government . . . of the United States . . . as recently evidenced by the amendment to the Sugar Act" (R. 102; App., p. 61) but this is an agitational and political statement and must be read in its historical context. The difficulties arising in considering the retaliatory nature of the legislation is an example *par excellence* of the danger of deciding legal cases on such contentious political issues.

The problem of "retaliation" is not quite as simple as it might seem. The Court of Appeals found that the nationalization decree of August 6, 1960, was intended as retaliation against the United States because it had terminated the sugar quota theretofore payable to Cuba (R. 181). The court below held that the act terminating the quota (Pub. L. 86-592, 74 Stat. 331, amending Act of August 8, 1947, c. 519, 61 Stat. 922; 34 U. S. C. 1100-1161), "whether . . . wise or unwise, fair or unfair," did not breach a rule of international law (R. 184).

But the Court of Appeals, in considering the Cuban legislation, condemned it precisely because it was unfair. Does the court apply one standard to Cuba and another to our own country? Is "fairness" relevant only in judging the laws of other governments?

Furthermore, it is not so clear that the amendment to the Sugar Act of 1948 did not breach international law. The Cuban government contended that the amendment to the Sugar Act constituted an aggression against the basic interests of the Cuban economy (R. 182). As the Court of Appeals admitted, it was "abundantly clear that the main purpose of the amendment was to impose a sanction against an unfriendly nation" (R. 182). But unfriendly or not, such sanctions clearly constituted economic pressure in an effort to influence the internal policies of Cuba, and were thus a violation of our treaty obligations under the Buenos Aires Protocol of Non-Intervention of December 23, 1936 (51 Stat. 41, T. S. 923; 188 L. N. T. S. 31) and the Charter of the Organization of American States (2 U. S. T. 2395; T. I. A. S. 2361), particularly Article 15 thereof.[20]

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[20] The Buenos Aires Protocol of Non-Intervention of December 23, 1936 (51 Stat. 41, T.S. 923; 188 L.N.T.S. 31) provides as follows:

> Article 1. The High Contracting Parties declare inadmissible the intervention of any of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties.

The Charter of the Organization of American States signed at Bogota April 30, 1948 (2 U.S.T. 2395; T.I.A.S. 2361; 119 U.N.T.S. 3) provides as follows:

> Article 15
>
> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personalty of the State or against its political, economic and cultural elements.

See also the Pact of Bogota, signed on April 30, 1948, which provides:

> Article 1. The High Contracting Parties, solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacigc procedures. I Annals of the Organization of American States, 91 (1949).

Clearly, if we are to consider political matters such as retaliation, we must do so objectively and judicially and on the basis of facts. Would it not be appropriate to consider, for example, the fact that as early as March 1960, months before the nationalization decrees in question and while our government maintained friendly diplomatic relations with Cuba, we were encouraging and financing groups on our territory organized to overthrow the lawful government of Cuba, in violation of international law, of our treaty obligations and even our neutrality laws?[21]

We do not urge that a court should consider these thorny problems; the Act of State doctrine makes such consideration inappropriate. We argue merely that if it is to consider them at all it must do so on the basis of facts, and by the application of legal, not political, standards.

Finally, it is unrealistic to say, as did the District Court, that the nationalization decrees were "unrelated to a public purpose." The decree of August 6, 1960, was but one of many which nationalized the property of Cubans and Americans in the course of transforming Cuba into a socialist state. See footnote 17, *supra*. Clearly all these decrees, including the one in question, were part of a general economic scheme to create a new form of government.

Hence the authorities cited by the Court of Appeals are totally inappropriate. The language used by Lord McNair

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[21] *The New York Times* of June 13, 1961, p. 18, col. 1, reported that former President Eisenhower acknowledged that on March 17, 1960, he ordered that governmental assistance be given to the Cuban exiles in the United States. Similarly Richard M. Nixon has said that: "Early in 1960 . . . the CIA was given instructions to provide arms, ammunition, and training for Cubans who had fled the Castro regime and were now in exile in the United States and various Latin American countries." Nixon, *Six Crises* at 352 (1962). This confirms a similar date given by Meyer and Szulc, *The Cuban Invasion* at 53, 54 (1962).

(*The Seizure of Property and Enterprises in Indonesia*, 6 Netherlands Int'l L. Rev. 218, 243 [1959], cited by the Court of Appeals at R. 183), in referring to the Indonesian seizures of Dutch property, is not applicable because there was a bona fide social and economic purpose to the Cuban nationalizations. The same is true with respect to the comments by the Italian Civil Court of Rome in *Anglo-Iranian Oil Co. Ltd. v. S. U. P. O. R. Co.*, [1955] Int'l L. Rep. 23, 42, also cited by the Court of Appeals at R. 183, since this expropriation clearly was not based on any of the grounds condemned by that court.

3. *The Court of Appeals found that the legislation authorized nationalization without compensation. This is not so and even if it were it would not be a violation of international law.*

The Court of Appeals, after considering the authorities cited to it by petitioner, came to the conclusion that it could not decide whether a government's failure, in and of itself, to pay adequate compensation for property seized is a breach of international law (R. 181). Nevertheless, it is clear that the failure to pay compensation was an important element in the decision of the court and it was one of the bases of the District Court's ruling.

The right to compensation for nationalized property has been the subject of extended discussion for many years. The famous debate between Professor Alexander D. Fachiri and Sir John Fisher Williams stated the opposing views on this subject rather fully, as of the period between the two World Wars. [*Fachiri, Expropriations & International Law*, Brit. Yb. Int'l L. 15 (1925); Williams, *International Law and the Property of Aliens*, Brit. Yb. Int'l L. 1 (1928).] With the passage of time the trend has, we believe, been clearly in the direction of the conclusion that that there is no right under international law to compensation for nationalized property.

Professor Samy Friedman, in his authoritative work on the subject, comes to the following conclusion after elaborate review of the literature:

> An examination of some of the more important reforms carried out by means of general expropriation has shown that it is impossible to deduce from the practice of States a legally binding rule according to which owners of property, whether national or foreign, expropriated as a result of these reforms, are to be compensated. . . . The fact is that the traditional forms of economy and social life appear to be undergoing a profound change. 'Increasingly with social development, the extreme postulates of individualist philosophy are considered to be anti-social, and individual welfare is subordinated to the general good. it is impossible for international law, in so far as the protection it accords to private property is concerned, to remain outside this universal change of ideas.' [quoting Brierly, *Regles general du droit de la paix*, 58 Hague Recueil (1936) Vol. 4, p. 171]. (Friedman, *Expropriation in International Law*, 206, 207.

See also Baade, *Indonesian Nationalization Measures before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801, 803, 804 (1960).

It may be doubted whether, so far as the Western Hemisphere is concerned, there ever was any recognized right by foreign owners of expropriated property to compensation. The most that can possibly be said was that they were held to be entitled to equal treatment. Thus, the Pan American Conference at Havana concluded, in 1928, that:

> Foreigners are obliged to make ordinary and extraordinary contributions, as well as forced loans, always provided that such measures apply to the population generally. (22 Am. J. Int'l L. Supp 136 [1928])

The Seventh Pan American Conference, held in 1933, at Montevideo, made this rule even more explicit, the Convention signed at that Conference reading:

> Nationals and foreigners are under the same protection of the law and the national authorities, and

> the foreigners may not claim rights other or more extensive than those of the nationals. (28 Am. J. Int'l L. Supp. 75 [1934])

The views expressed by the Mexican Government in the course of its extensive diplomatic correspondence with the United States in connection with the Agrarian Land Reform Program of Mexico probably sets forth accurately the Latin American position on the entire subject of compensation ([1938] 5 For. Rel. U. S. 679-702). The Mexican Minister for Foreign Affairs, in a note to the United States Ambassador dated August 3, 1938, said:

> My Government maintains . . . that there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land.
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> . . . . .
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> Without attempting to refute the point of view of the American Government, I wish to draw your attention very specially to the fact that the agrarian reform is not only one of the aspects of a program of social betterment attempted by a government or a political group for the purpose of trying out new doctrines, but also constitutes the fulfilling of the most important of the demands of the Mexican people, who, in the revolutionary struggle, for the purpose of obtaining it, sacrificed the very lives of their sons. The political, social, and economic stability and the peace of Mexico depend on the land being placed anew in the hands of the country people who work it; therefore, its distribution, which implies the transformation of the country, that is to say, the future of the nation, could not be halted by the impossibility of paying immediately the value of the

> properties belonging to a small number of foreigners who seek only a lucrative end. (*id.* at 679)[22]

The nationalization of C. A. V.'s property by the government of Cuba is not an unprecedented occurrence. Similar nationalizations have taken place repeatedly over the past forty-five years. The Russian Government nationalized the property of Americans in 1917 and 1918; the Mexican Government nationalized oil properties of United States corporations. Following the Second World War there were extensive nationalizations in Poland, Yugoslavia, Czechoslovakia, Rumania, Indonesia and in many other places.[23] In discussing these and other nationalizations in relation to problems of compensation, it has been said, with much force:

> Far from being a "rule" of international law in the extensive deprivation context, the demand for "full" or "prompt, adequate and effective" compensation would appear to be little more than a preference assumed for bargaining purposes—an element of legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy. (Dawson and Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?* 30 Fordham L. Rev. 727, 757 [1962].)[24]

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[22] Were it not impractical, we would reprint in full the several notes sent by the Mexican Government to the United States on this subject, since they set forth with logic and dignity the position of an underdeveloped country which is seeking to provide a better life for its people and which finds itself unable to make compensation for the property expropriated. The reasoning therein set forth does not, we believe differ materially from the justifications for similar expropriations which have taken place more recently in Indonesia and Brazil and which are currently taking place in Ceylon.

[23] We do not suggest that governmental confiscation of property started in 1917. Indeed, the American Colonies during and after the Revolutionary War confiscated Tory property in the Colonies and never made adequate compensation. See Van Tyne, *Loyalists and the American Revolution*, at 276, 335 (1929).

[24] This article contains a great deal of valuable material relating to recent practice in the handling of nationalization claims.

Two significant events have occurred since the opinion of the Court of Appeals which serve to emphasize the lack of agreement as to the right to compensation. The first of these was a vote taken in the General Assembly of the United Nations on December 12, 1962, in its consideration of a report submitted to it by its Commission on Permanent Sovereignty over Natural Wealth and Resources. The resolution proposed by the Commission declared that nationalization, expropriation or requisitioning of private property was lawful if based on national interest, which was recognized as overriding purely individual or private interests, whether domestic or foreign. The Commission's draft provided, in paragraph 4:

> In such cases [of nationalization] the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, national jurisdiction should be resorted to. Upon agreement by the parties concerned, settlement of the dispute may be made through arbitration or international adjudication. (U.N. Gen. Ass. Off. Rec. 17th Sess. A/5344/Add. 1, 12 December 1962 at 3.)

Two amendments were proposed: First, to insert a sentence providing that the General Assembly: "Confirms the inalienable right of peoples and nations to the unobstructed execution of nationalization, expropriation and other essential measures aimed at protecting and strengthening their sovereignty over their national wealth and resources"; second, to replace the second sentence of the committee draft with the following: "The question of payment of compensation to the owners shall in such cases be decided in accordance with the national law of the country taking those measures in the exercise of that sovereignty" (*id.* at 7). Two roll call votes were taken. On the first amendment the vote was 30 to 30, with 34

nations abstaining (*id.* at 15). The second amendment was rejected by a vote of 39 to 28, with 21 abstentions (*id.* at 16).[25]

The United Nations is not a legislative body and certainly cannot make international law. It may, however, fairly be said that the views of the statesmen attending the General Assembly sessions reflect, at least in a general way, the views of their respective governments concerning such vital matters of public interest. On a critical issue with respect to the right to compensation, a majority of the members of the General Assembly were not prepared to vote for a resolution calling for compensation in any form.

An equally striking illustration was provided this past summer at the World Conference on "World Peace Through the Rule of Law" held in Athens early in July 1963. The official reports of the work of the conference are not yet available. However, the press reported that on Friday, July 5, this conference, composed of leading members of the Bar from all over the world, considered a draft resolution which opposed "expropriation or nationalization unless there is a provision for prompt, adequate and effective compensation". There was much confusion and opposition, coming principally from representatives of the underdeveloped countries such as Panama, Thailand, Cambodia and others. Although the draft resolution was passed, there was so much dissatisfaction expressed and so much confusion over the method in which the draft had been presented that the matter was reopened on the next day, when a new resolution was adopted. The resolution of the previous day was withdrawn and instead the Conference recommended that "the problems involved in expropriation or nationalization and the provision of

[25] A report of the lengthy proceedings leading up to the General Assembly vote can be found in 18 The Record of the Association of the Bar of the City of New York 377 (1963).

prompt, adequate and effective compensation with due consideration of the varied interests involved" be referred to a proposed World Peace Through Law Center for study.[26] This result is even more striking in view of the fact that so far as we know no representatives of socialist countries attended the conference. 'Even among non-socialist countries, it is clear this is a subject on which there is so little agreement that no consensus can be reached.

In summary, we urge that the Cuban nationalization decrees did not in any way violate international law. The Court of Appeals was able to cite no authority in support of its holding which was strictly limited to the peculiar facts of this case. The policy considerations urged by the court are, we contend, quite without validity and, indeed, are contrary both to the law previously enunciated by this Court and to the political considerations which necessarily affect cases of this kind.

POINT V

The reliance by the Court of Appeals upon matter not in the record violated petitioner's rights to due process of law.

The correspondence relied on by the Court of Appeals as creating an "exception to the judicial abnegation required by the Act of State doctrine" (R. 169) was not in the record before the District Court. Fragments of this correspondence made their first appearance in this case in an appendix to the brief submitted by the *amicus*

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[26] *New York Times*, July 6, 1963, p. 3, col. 1; July 7, p. 5, col. 1. The text of the resolution finally adopted was kindly supplied to counsel by Charles S. Rhyne, Esq., Chairman of the Special Committee on World Peace Through Law of the American Bar Association in a letter dated July 29, 1963.

curiae to the Court of Appeals. Petitioner was not a party to this correspondence. It did not see the correspondence in its entirety until the Solicitor General filed his *amicus* brief in this Court on the petition for certiorari in this case.

The reliance placed by the court below on the informal extra-judicial correspondence, which it described with extraordinary understatement as "somewhat ambiguous" (R. 170) constitutes a clear violation of due process of law, especially on an issue of such importance to the conclusion reached. Consideration of evidence by an appellate court which was not in the record before the court below violates "the fundamental concept of procedural due process that a party to litigation is entitled to have the evidence relied on by his opponent presented at the hearing of his case so that he may have opportunity to cross-examine his opponent's witnesses and to offer evidence in rebuttal." *In re Aughenbaugh*, 125 F. 2d 887, 889 (C. C. A. 3, 1941). See also, *Morgan* v. *United States*, 304 U. S. 1, 18; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 302-304; *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 93.

This Court has consistently held that an appellate court "can act on no evidence which was not before the court below or receive any paper that was not used at the hearing." *Boone* v. *Chiles*, 35 U. S. (10 Peters) 177, 208; *Mitchel, et al.* v. *United States*, 34 U. S. (9 Peters) 711, 731; *Henneford* v. *Northern Pac. Ry. Co.*, 303 U. S. 17-19; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589-90; *Thomson* v. *Gaskill*, 315 U. S. 442, 446; *Ciucci* v. *State*, 356 U. S. 571, 573.

The present case might well be cited as a prime example of the consequences of the grievous error committed by the Court of Appeals. It is obvious from a reading of the case that the correspondence on which the Court of Appeals relied was essential to the decision it reached. Petitioner had never seen any of this correspondence; it never had an

opportunity to challenge its accuracy; it never had the chance to examine the full text of the letters quoted; it never had a chance to cross-examine as to the circumstances under which the correspondence was written. On the face of it and at the time the petition for certiorari was filed, this seemed to be sufficient to justify a reversal of the decision below, without more.

However, there was more. The Solicitor General has disclosed that the excerpts from the correspondence presented to the Court by the *amicus curiae* were misleading; that they were fragments of a much more extensive correspondence, the very existence of which was concealed from the court below and that the meaning attributed to the correspondence by both the *amicus curiae* and the Court of Appeals was erroneous.

That the *amicus curiae* should have thus sought to mislead the Court of Appeals is regrettable; but that the Court of Appeals should have completely disregarded the most elementary principles of due process is more than regrettable; it is reversible error.

POINT VI

In any event, petitioner had good title to the sugar in question and if C. A. V. had any remedy it was for damages in an international forum.

Even if we are to assume that the Act of State doctrine is not conclusive in support of petitioner's claim; even if we assume further that Cuba did violate international law by nationalizing C.A.V.'s property; and even if we assume that such violation creates rights of some kind in C.A.V. or in respondent Farr, the question remains as to the nature of those rights and the method of enforcement. The Court of Appeals, having held that the nationalization was illegal, erroneously concluded that petitioner's title to the sugar in question was void; indeed, it said: "If the ap-

pellant's title was not rendered void, Farr, Whitlock was guilty of conversion of the bills of lading and the proceeds of the sale even though C.A.V. has not been compensated for the taking" (R. 187). The court recognized that it was here giving "a restitutory remedy" (R. 188).

With great respect for the court below, we suggest that this result is absurd. It is not only unsupported by the law, but would play havoc with title to goods in international trade. It would mean that every cigar produced by a nationalized cigar factory could be seized by the former owner if found in a cigar store in London; that sugar from a nationalized sugar refinery could be seized from a warehouse in Morocco; that fruit from a nationalized Cuban farm could be taken from a food store in Algiers.

Such a conclusion is contrary to law. It is impractical as a working matter and is directly contrary to the public policy of the Executive Branch of our government. If C.A.V. has any rights at all, it has a claim for damages, not restitution; if it has any forum for enforcement of those rights, it is in a diplomatic, not a judicial forum.

Virtually every authority in the field agrees that a nation has the right to nationalize property. Certainly this has been true of the United States: "My government has frequently asserted . . . the sovereign right of any government to expropriate private property within its border in furtherance of public purposes," said Secretary of State Hull in a note addressed to the Mexican Government seeking compensation for agrarian appropriations ([1938] 5 For. Rel. U. S. 674). The wrong, if there is any, consists in the method of nationalization. We know of no case either domestic or foreign which has held that title which passed in an "illegal" confiscation was void.[26] We have never seen a case nor has one been cited to us holding that restitution is permissible.

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[26] Except *Anglo-Iranian Oil Co. Ltd.* v. *Jaffrate* (*The Rose Mary*), [1953] 1 Weekly L. R. 246 criticized in *In re Claim of Hilbert Wagg & Co. Ltd.* [1956], 1 Ch. 323, 346.

A review of all the authorities on the subject would be impossible. Much of the discussion appears in diplomatic correspondence, in the findings of international tribunals and in legal writings on the subject. Professor Baade, of Duke University, has collected many of the authorities in three articles: *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801 (1960); *The Validity of Foreign Confiscations: An Addendum*, 56 Am. J. Int'l L. 504 (1962); and *The Legal Effect of Cuban Expropriations in the United States* (1963) Duke L. J. 290.

We shall confine ourselves to a few recent instances as illustrative. When, pursuant to the agrarian land reform program of Mexico, that nation started to nationalize United States-owned property, extensive negotiations between the Government of the United States and that of Mexico took place. A reading of the diplomatic correspondence on the subject recently published in (1940) 5 For. Rel. U. S. 976-1029, makes it abundantly clear that the only claim by the United States was for damages for the seizure. Throughout the extensive correspondence there is no suggestion that the *validity* of the Mexican action was at issue; at no point was it suggested that the properties should be returned.

This was not an oversight. The British, Dutch and United States oil companies all wanted restitution and pressed vigorously for it. See Richberg, *The Mexican Oil Seizure*, undated pamphlet, *passim*. Furthermore, both Great Britain and the Netherlands demanded restitution and urged a "united front" with our State Department. Undersecretary of State Welles refused to act in concert because, he said:

> . . . the course pursued by Great Britain had been diverted very largely to an arbitration of her position that the properties should be immediately restored to the owners, whereas the United States . . . never questioned the legal right of the Mexican

> government to expropriate properties within its jurisdiction,

but insisted on compensation ([1940] 5 For. Rel. U. S. 995).

The United States took the same position in the General Aniline and Film Co. dispute, referred to *supra* at pp. 21-22. Here again the State Department argued that title depended solely on the law of the state in which property was located. The attorney who had represented the United States in arguing the case before the International Court of Justice said:

> . . . the Department proceeds from the recognized principle of international law that the disposition of title to property located within a country . . . is within the domestic jurisdiction of that country [citing, in a footnote, P. C. I. J., *Case of Panevezys-Saldutiskis Railway*, 4 Hudson, World Court Rep. 347, at 359 (1939); II Moore, *Digest of Int'l L.* 33 (1906); 3 Hackworth, *Digest of Int'l L.* 6-7 (1941)]. (Jacoby, *Toward A Rule of Law?*, 52 Am. J. Int'l L. 107, 109-110 [1958].)

Finally, and perhaps most significant, is the attitude of the State Department toward the Cuban expropriations. In the Memorandum submitted by the State and Justice Departments to this Court in the *Bahia de Nipe* litigation above referred to, *supra* at p. 26 the Department said, in language which is unmistakable in its meaning:

> 1. Petitioner, in effect, seeks redress in this proceeding for the expropriation of its property allegedly owned by it in Cuba. But no such redress is available here. It may be assumed that the confiscation is unlawful under international law, i. e., so far as relations between the Governments of the United States and Cuba are concerned. But that does not mean that Cuba, as between itself and petitioner, does not have valid title to the expropriated property so far as our courts are concerned. (Memorandum of Solicitor General to this Court on application by United Fruit Co. for stay, *Rich* v. *Naviera Vacuba*, *supra*, at p. 2)

One final point must be made and, although it is made at the end of our argument, it is in a sense essential to a full understanding of the significance of much that has gone before. Assuming again that the property owner of nationalized property has a valid claim, there is a time-honored and currently effective method for handling these problems. This Court said in *Shapleigh* v. *Mier*, 299 U. S. 468, at 471:

> The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedy to be followed is along the channels of diplomacy.

And in the *Ricaud* case, p. 12, *supra*, at 310, this Court said: "Whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our government". See also, *United States* v. *Diekelman*, 92 U. S. 520, 524.

Our State Department has already indicated its perspective on this subject. On March 1, 1961, it issued a Memorandum setting forth the views of the Department concerning claims based on nationalization or other taking of property of American nationals by the Cuban authorities. The Department said:

> The Department is unable to predict when and in what manner it will be possible to settle this problem. In the past the Department has settled similar problems (1) by submitting individual claims through the diplomatic channel to the foreign government concerned and obtaining restitution or compensation; (2) by obtaining a lump sum in settlement of all claims, with the amount paid distributed by an agency of the United States Government; or (3) by an agreement submitting all claims to an international arbitral tribunal for adjudication.

Since the United States Government has not obtained agreement with Cuba for restitution, payment of a lump sum or for international arbitration, the only possibility at present would be for the United States Government formally to espouse through the diplomatic channel individual claims of American nations. While the Department can give no assurance that claims it espouses would be paid by the Cuban Government, it is ready to receive and consider for presentation any claim which is properly prepared and documented and is valid from an international legal standpoint.

The Department does not use forms for claims against foreign governments but has memoranda explaining how such claims should be prepared and documented. Its memorandum of March 1, 1961, on the preparation of claims for loss of or damage to property is attached. In addition to the evidence which is mentioned in that memorandum, evidence should also be submitted showing that the American national exhausted such legal remedies as were available in Cuba and in the process sustained a denial of justice, as that term is understood in international law, or that the laws of Cuba do not provide a remedy or, if provided, that it would be futile to attempt to exhaust such remedy. The requirement for exhaustion of legal remedies is based upon the generally accepted rule of international law that international responsibility may not be invoked as regards reparation for losses or damages sustained by a foreigner until after exhaustion of the remedies available under local law. This, of course, does not mean that "legal remedies" must be exhausted if there are none to exhaust or if the procurement of justice would be impossible.

Each American national must decide whether to prepare a claim now, either with a view to its presentation through the diplomatic channel when ready, or in order that it will be ready in the event that a claims settlement with Cuba is effected at a later time. Each American national must also decide whether to "exhaust legal remedies" in Cuba, either with a view to obtaining restitution or adequate

compensation or documentary evidence which could be used to show that justice could not be obtained by judicial proceedings. Generally, unsupported assertions to the effect that it would be useless to exhaust or attempt to exhaust legal remedies would, of course, have less evidentiary value than a court decree or other documentary evidence demonstrating the futility of exhausing or attempting to exhaust legal remedies. (Printed in Kerley, *Contemporary Practice of the United States Relating to International Law*, 56 Am. J. Int'l L. 165, 166 [1962]).

It will be noted, first, that the State Department nowhere suggests the possibility of obtaining relief through judicial process. It will be noted further that the State Department refers to its practice in handling similar problems in the past.

Finally it will be noted that the Department places considerable emphasis on the exhaustion of remedies in the nationalizing state. There is no allegation here that remedies in Cuba have been exhausted, nor is any evidence presented to show that pursuit of remedies in Cuba would be futile.

It is, indeed, true that the problem of compensation to United States nationals has always been treated as a political question; in most cases ultimately a political solution has been worked out, sometimes after a period of some years. In 1933, by virtue of the Litvinov assignment, a political understanding was reached to take care of Russian nationalization. Treaties have been signed with Mexico, Yugoslavia, Poland, Italy and Rumania to compensate our nations for property seized. (*Mexico*: Convention for Adjustment and Settlement of Outstanding Claims, Washington, November 19, 1941, 56 Stat. 1347, T. S. 980, 125 U. N. T. S. 287; Agreement Relating to Payments for Expropriated Petroleum Properties, September 25 and 29, 1943, 58 Stat. 1408, 106 U. N. T. S. 265; *Poland*: Agreement of July 16, 1960, T. I. A. S. 4545; *Yugoslavia*:

Agreement of July 19, 1948, 62 Stat. 2658, T. I. A. S. 1803, 89 U. N. T. S. 43; *USSR*: Exchange of Correspondence between Maxim Litvinov and Franklin D. Roosevelt, November 16, 1933 [Litvinov Assignments], Dep't of State, Eastern European Series No. 1 [1933]; *Italy*: Memorandum of Understanding Regarding Settlement of certain Wartime Claims, 61 Stat. 3962, 36 U. N. T. S. 53; *Rumania*: Dep't of State Press Release No. 159 of March 30, 1960; 54 Am. J. Int'l L. 742 [1960]).

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded with instructions to enter summary judgment in favor of petitioner.

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner.

Dated, August 29, 1963.

APPENDIX

I, Doctor Carlos Olivares Sanchez, Attorney-at-Law, Minister of Foreign Relations of the Revolutionary Government of the Republic of Cuba,

HEREBY CERTIFY

First: That under date of July the sixth, nineteen hundred and sixty, The Council of Cabinet Ministers promulgated Law—Number Eight Hundred and Fifty-one which, literally transcribed, reads that:

Ministry of the Treasury

I, Dr. Osvaldo Dorticos Torrado, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following legislation:

Whereas, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

Whereas, Article 24 of the Fundamental Law of the Republic authorizes the forced expropriation of

property, leaving it to the ordinary laws to confer authority and competent jurisdiction to decree the expropriations and to regulate the procedure for the accomplishment thereof and the means and terms for the payment of the expropriated property.

WHEREAS, it is advisable, with a view to the ends referred to in the First Whereas of this Law, to confer upon the President and Prime Minister of the Republic full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons who are nationals of the United States of North America, or of enterprises which have majority interest or participations in such enterprises, even though they be organized under the Cuban laws, so that the required measures may be adopted in future cases with a view to the ends pursued.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact and promulgate the following

LAW No. 851

ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriations, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

ARTICLE 2. In the resolutions providing for the expropriations the President and the Prime Minister

of the Republic shall declare the necessity, public utility and national interest justifying such action.

ARTICLE 3. The President and the Prime Minister of the Republic shall also designate in the resolutions above referred to in Article I of this Law, the persons or agencies that shall have charge of the administration of the properties or enterprises expropriated hereunder.

ARTICLE 4. Once the expropriation of a property has been consummated and the administration thereof taken over by the person or agency designated therefor, the President and the Prime Minister of the Republic shall appoint appraisers of their election to determine the value of the expropriated property for the purposes of the payment thereof, which shall be effected as provided in the following article.

ARTICLE 5. The payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this Law.

b) For the amortization of said bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3.000.000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this

end the National Bank of Cuba shall open a special dollar account which shall be captioned "Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America."

c) The Bonds shall draw at least two per cent (2%) annual interest, which shall be paid only and exclusively out of the fund to be set up and fed pursuant to Rule b).

d) Such annual interest as cannot be paid out of said Fund referred to above in Rule b) shall not be cumulative, but—the obligation to pay it shall be deemed extinguished.

e) The Bonds shall be amortized in a period of not less than thirty (30) years counted from the date on which the expropriation of the property or enterprise involved is actually consummated, and the President of the National Bank of Cuba is hereby authorized to determine how and to what extent they will be amortized.

ARTICLE 6. The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available thereagainst.

ARTICLE 7. The Minister of the Treasury is hereby directed to issue, in the name and behalf of the Cuban State, the bonds with which the property expropriated hereunder will be paiid for.

ARTICLE 8. This Law supersedes all and whatever legal and statutory provisions may be repugnant hereto, or may conflict with the enforcement hereof, and shall become operative from the date of its publication in the Official Gazette of the Republic.

NOW THEREFORE: I hereby order that this law be fully and strictly observed and enforced.

Done at the Presidential Palace, in Havana, this 6th day of July, 1960.

OSVALDO DORTICOS TORRADO
President

Fidel Castro Ruz, Prime Minister.
Rolando Díaz Aztaraín, Minister of the Treasury.
(Official Gazette No. 130, of July 7, 1960.)

(SEAL)

SECOND: That on August the sixth, nineteen hundred and sixty, the Hon. President of the Republic and the Prime Minister of the Revolutionary Government, issued Resolution Number One, the literal transcription thereof being as follows:

EXECUTIVE POWER

RESOLUTION No. 1

WHEREAS, Law No. 851, of July 6, 1960, published in the Official Gazette of July 7, 1960, authorized the undersigned to provide, through joint resolutions, whenever they deem it advisable in order to defend the national interests, for the nationalization through compulsory expropriation, of the property or enterprises owned by physical and corporate persons who are nationals of the United States of North America, and the enterprises in which such persons have any interest or participation, even though they have been organized under the Cuban laws.

WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America, of continued aggression, for political purposes, against the basic interests of the

Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country, whereby exceptional powers were conferred upon the President of said nation to reduce the participation of Cuban sugars in the sugar market of said country, as a weapon of political action against Cuba, was considered as the fundamental justification of said law.

WHEREAS, the Chief Executive of the Government of the United States of North America, making use of said exceptional powers, and assuming an obvious attitude of economic and political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process.

WHEREAS, this action constitutes a reiteration of the continued conduct of the government of the United States of North America, intended to prevent the exercise of its sovereignty and its integral development by our people thereby serving the base interests of the North American trusts, which have hindered the growth of our economy and the consolidation of our political freedom.

WHEREAS, in the face of such developments the undersigned, being fully conscious of their great historical responsibility and in legitimate defense of the national economy are duty bound to adopt the measures deemed necessary to counteract the harm done by the aggression inflicted upon our nation.

WHEREAS, according to our constitutional and legal regime, in the exercise of our sovereignty and as a measure of internal legislation, believing that it is advisable, in the face of the consummation of the

aggressive measures referred to in the foregoing clauses, to exercise the powers vested in the undersigned by Law No. 851, of July 6, 1960, i.e., to proceed to the compulsory expropriation in favor of the Cuban State of property and enterprises owned by juridical persons that are nationals of the United States of North America, as a decision justified by the necessity of our nation to be indemnified for the harm done to its economy and to affirm the consolidation of the economic independence of the country.

WHEREAS, the "Compañia Cubana de Electricidad" and the "Cuban Telephone Company" represent typical examples of the profiteering and despoiling monopolies which have exploited and taken undue advantage, for many years, of the economy of the nation and the interests of the people.

WHEREAS, the sugar manufacturing companies took possession of the best lands of our country under the protection of the Platt Amendment, an ominous clause designed to permit control of the national economy which facilitated the invasion of the country by the imperialistic capital of its insatiable and unscrupulously foreign masters who have recovered many times the value of their investments.

WHEREAS, the petroleum companies have continuedly robbed the economy of the nation by charging monopoly prices which resulted, for many years, in heavy disbursements of foreign exchange and, in their eagerness to perpetuate their privileges, ignored the laws of the nation and hatched a criminal scheme to boycott our country, thereby forcing the Revolutionary Government to provide for their intervention.

WHEREAS, it is the duty of the peoples of Latin America to strive for the recovery of their native

wealth by wresting it from the hands of the foreign monopolies and interests which prevent their development, promote political interference, and impair the sovereignty of the underdeveloped countries of America.

WHEREAS, the Cuban Revolution will not stop until it shall have totally and definitely liberated its fatherland.

WHEREAS, Cuba must be a luminous and stimulating example for the sister nations of America and all the underdeveloped countries of the world to follow in their struggle to free themselves from the brutal claws of Imperialism.

NOW, THEREFORE: In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby,

RESOLVE:

FIRST: To order the nationalization, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest, as listed below, to wit:

1.—Compañía Cubana de Electricidad.

2.—Cuban Telephone Company (Compañía Cubana de Teléfonos).

3.—Esso Standard Oil, S.A. División de Cuba.

4.—Texas Co. West Indies (Ltd.)

5.—Sinclair Cuba Oil Co., S.A.

6.—Central Cunagua, S.A.

7.—Compañía Azucarera Atlántica del Golfo, S.A.

8.—Compañía Central Altagracia, S.A.

9.—Miranda Sugar Estates.

10.—Compañía Cubana, S.A.

11.—The Cuban American Sugar Mills.

12.—Cuban Trading Company.

13.—The New Tuinicú Sugar Co. Inc.

14.—The Francisco Sugar Company.

15.—Compañía Azucarera Céspedes.

16.—Manatí Sugar Company.

17.—Punta Alegre Sugar Sales Company.

18.—Baraguá Industrial Corporation of New York.

19.—Florida Industrial Corporation of New York.

20.—Mac[illegible]ño Industrial Corporation of New York.

21—General Sugar Estates.

22.—Compañía Azucarera Vertientes Camagüey de Cuba.

23.—Guantánamo Sugar Company.

24.—United Fruit Sugar Company.

25.—Compañía Azucarera Soledad, S.A.

26.—Central Ermita, S.A.

SECOND. Consequently, the Cuban State is hereby subrogated in the place and stead of the juridical persons listed in the preceding section, in respect of

the property, rights and interests aforesaid, and of the assets and liabilities constituting the capital of said enterprises.

THIRD. It is hereby declared that these compulsory expropriations are carried out for the reasons of public necessity and national interest referred to in the introductory clauses of this Resolution.

FOURTH. In accordance with the provision contained in Article 3 of Law No. 851, of July 6, 1960, the National Institute of Agrarian Reform is hereby designated as the organization that will be in charge, through the Department of Industrialization of its "General Administration of Sugar Mills," and through the Cuban Petroleum Institute, and with all the powers inherent in the functions hereby entrusted to them, of the administration of the property and enterprises constituting the subject of the expropriations provided for in this Resolution.

FIFTH. The organizations mentioned in the preceding section shall designate the officials elected by them, who, acting in their names, will take over the management of said property and enterprises without any limitation whatsoever; and once such managements shall have been assumed, they shall report such action to the undersigned in order to appoint the experts who will value the property expropriated hereunder, for the purposes of the payment therefor as directed by Law No. 851, of July 6, 1960.

SIXTH. The managers so designated are hereby further authorized to proceed to the immediate preventive intervention of the juridical persons, enterprises and property which are subsidiary and appurtenant or associated to those constituting the subject of this Resolution; and once such interventions shall have been effected, such steps shall be reported to the undersigned for proper action.

SEVENTH. Due authority is hereby conferred upon the organizations designated above, to proceed to the proper notifications of this Resolution to the legal representatives of the juridical persons thereby affected, and to carry out what has been resolved.

EIGHTH. Due authority is hereby likewise conferred upon said organizations to issue, as a consequence of the adjudications in favor of the Cuban State of the enterprises, property, rights and interests to which this Resolution refers, the proper orders to the respective Real Property Registrars, Provincial Registrars of Corporations, and Mercantile Registrars, to enter the consequent registrations in behalf of the Cuban State.

DONE in Havana, this 6th day of August, 1960.

Fidel Castro Ruz
Primer Ministro.

Osvaldo Dorticós Torrado
Presidente.

(Official Gazette No. 16 (Special Issue) of August 6, 1960.)

(SEAL)

THIRD: That the legal resolutions hereinabove transcribed remain in full force and effect, without their having been either revoked, suspended or modified, in whole or in part.

AND, FOR RECORD PURPOSES, the Certificate hereof is issued, in the City of Havana, this twenty-fifth day of November, nineteen hundred and sixty,—"Year of the Agrarian Reform."

Dr C O S.
Minister of Foreign Relations.
Dr. Carlos Olivares Sánchez.

(SEAL)